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**The American University in Cairo**

**School of Global Affairs and Public Policy**

**Regulating Demographics through Regulating Marriage: Israel's  
Millet-Based Approach to Personal Status Law and its Ramifications on  
the Social Hierarchy**

**A Thesis Submitted to the**

**Department of Law**

**in partial fulfillment of the requirements for the degree of  
Master of Arts in International Human Rights Law**

**By**

**Briana Nicole Nirenberg**

**September 2020**

The American University in Cairo  
School of Global Affairs and Public Policy

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Personal Status Law and its Ramifications on the Social Hierarchy

A Thesis Submitted by

*Briana Nicole Nirenberg*

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in partial fulfillment of the requirements for the degree of  
Master of Arts in International Human Rights Law  
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The American University in Cairo  
School of Global Affairs and Public Policy  
Department of Law

REGULATING DEMOGRAPHICS THROUGH REGULATING MARRIAGE:  
ISRAEL'S MILLET-BASED APPROACH TO PERSONAL STATUS LAW AND ITS  
RAMIFICATIONS ON THE SOCIAL HIERARCHY

Briana Nicole Nirenberg

Supervised by Professor Hani Sayed

ABSTRACT

Identity, though deeply personal, has often been exploited by the ruling class in order to gain power over their subjects. The preservation of social cleavages—be they national, ethnic, racial, religious, *et cetera*—is thus a matter of public policy. To ensure the propagation of a certain identity, the state must rely on its current citizens to reproduce the social structures that give their identities value. In order to maintain boundaries between the factions, groups must remain “pure” lest these structures be challenged. While prohibitions on whom an individual can marry exist across systems, they take on different, more subtle forms in the modern era. In the Middle East, legal approaches to marriage often emulate the *millet* system of the Ottoman Empire, in which religious communities have jurisdiction over their adherents in affairs relating to personal status. Using Israel as a case study, this paper explores the careful negotiation that occurs when a legal system attempts to incorporate religious law into civil law, which naturally presents both practical and ideological challenges. A country less than a century old, Israel is home to a complex social hierarchy of various ethnic and religious groups, a social hierarchy in which one’s ethnic or religious identification is often cross-cutting with his socioeconomic status, level of education, and presumed loyalty to the state. It is also a social hierarchy that despite—or maybe because—of its complexities is quite rigid. Due to the state’s delegation of personal status to the religious courts, the religious demographics of the state, and the fact that all of Israel’s religious authorities have prohibitions against marrying a member of another faith, interfaith marriage remains an impossibility for most, with even informal recognition being difficult to obtain. Israel has capitalized on the forced segregation imposed by the millet system and used as means of demographic regulations, despite its infringement on the right to choose one’s own romantic partner.

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## I. Introduction

On August 17, 2014, Morel Malka, a Jewish-born convert to Islam, married Palestinian Mahmoud Mansour in Israel while a crowd of 200 protested, enraged over their “mixed” marriage<sup>1</sup>. On June 18, 2020, I, the daughter of a couple in some places considered interfaith, married an Egyptian man whose ID says Muslim. Our relationship thus far has brought different feelings from different sides of the family, with his side deeply bothered by the apparent religious difference. Even though we are both atheists, and even though Muslim men can marry Jewish women, we too have forever been labeled an “interfaith” couple by his family and colleagues in Cairo, a label that brings negative connotations with it. In both cases, the individuals getting married were technically practicing the same religion yet viewed by the society around them to have such conflicting sets of values and beliefs. But there is too a fundamental difference between the two weddings. Mine did not have protesters, yet the Malka-Mansour stirred national controversy over both the way in which marriage is structured in the country as well as intermarriage’s impacts on ethnoreligious identity<sup>2</sup>.

My husband and I did not involve any religious authority in our marriage. Such is possible in the United States and countries with similar civil institutions for marriage and family affairs. However, such a system is far from universal. Many countries, particularly in the Middle East, delegate marriage, divorce, and other various elements of personal status law to the jurisdiction of the local religious institutions. Such religious sovereignty, in which each denomination has authority over its own adherents, dates back to the millet system of the Ottoman Empire. Its continuation is based both upon the degree of political power the religious institutions have within the federal systems of Middle Eastern states, as well as divisions present within national identity, which are typically split along religious cleavages. Many religions, especially the denominations present in the region, place limitations on whom an individual is permitted to marry, with at least some restrictions on interfaith marriage being seen in all three of the dominant Abrahamic

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<sup>1</sup> Sylvie Fogiel-Bijaoui, *Sleeping with the ‘Enemy’: Mixed Marriages in the Israeli Media*, 36 JOURNAL OF ISRAELI HISTORY 213 (2017). at 213.

<sup>2</sup> *Id.*

faiths. In the delegation to authorities that discriminate on the basis of religion, as well as the utter refusal to provide an alternative for couples who do not wish to be bound by religious law, the state not only condones prejudicial practices, but actively enforces them.

Coincidentally, in systems where such delegation to the religious authorities occurs, marriage is often a euphemism for breeding with given the social imperative for reproduction. As such, marriage in these countries is not about love necessarily, but about propagation of genes, and with it, the propagation of identity. Furthermore, in many of the systems that lack civil marriage entirely, marriage is also the only socially recognized channel for family building. This is all the stronger when religion is a key part of both individual identity and the collective culture. As religions often have prohibitions against intermarriage while simultaneously teaching that sex outside of the marital context is wrong, the growing trend in the West of granting legitimacy to unmarried, cohabitating couples is socially infeasible. All of these sociolegal factors create an environment in which individuals are essentially forced into endogamy. A lack of exposure to other social groups, as well as an emphasis on keeping the community “pure” and propagating certain social ties, reinforces the idea that whatever particular group an individual comes from is somehow relevant to the type of relationship that can be formed with that individual. Proverbial walls go up between “them” and “us”, solidifying boundaries between the various factions, reinforcing social hierarchies, and making upward mobility all the more difficult for those who comprise lower rungs on the social ladder.

This paper explores the way in which social identity can be and has been utilized by various regimes in various systems as a political tool through the use of Israel as a case study. Be the primary source of social division within a system racial, religious, ethnic, national, or a combination of several of these elements, similarities are nonetheless shared, specifically when it comes to the politics of division and ensuring that each faction remains its own distinct faction. My research question specifically focuses on modern approaches to state interference in family formation. Seeing as throughout history and across continents, countries have routinely prohibited, even if not explicitly, interfaith, interracial, and other “othered” relationships, I seek to explore the connection between the enforcement of endogamy and factional hegemony. In societies



with deeply engrained tensions between primary social groups, what happens when intermarriages do occur? What ramifications would these unions, as well as the children of these unions, have on the social hierarchy's usage as a tool of the state? Beginning with social identity as a generality to establish its basis as an instrument, I then focus on the history of regulating marriage, tracing the exact means through which couples have been denied access to the institution solely for falling outside what the state has deemed an acceptable family construct. This then leads to the millet system, left behind by the Ottoman Empire, whose remnants continue to ensure that interfaith couples in the Middle East today are still unable to marry. The theoretical foundations part is finished by literature on intermarriage and the way children of mixed parentage challenge the conventionally accepted means of identity. All these elements come together in Part III, where they are applied to the real-life example of Israel, a democracy whose system of family law ensures that Jews and Arabs remain segregated.

## II. Foundations

### A. *Nationalism & Social Identity*

The modern era has birthed both technological and social innovations those from prior centuries never could have imagined. However, despite this radical change, some concepts have remained fairly constant. Throughout the history of civilization, individuals have formed groups to separate themselves from other clusters of individuals. Often, there were tensions, discontent, rivalry, or even full-fledged warfare between the different groups. Whereas many scholars in the early 20<sup>th</sup> century believed that the concept of ethnicity would be eroded “by modernity, by the maturation of the nation-state, and by the globalization of industrial capitalism<sup>3</sup>”, ethnic divides and desire to maintain identity are as strong as ever. The traditional theories surrounding the creation of social identity—being the umbrella term under which national, ethnic, and religious identity are included—primarily consisted of primordialism, constructivism, and the less popular instrumentalism<sup>4</sup>.

Primordialism is the idea the ethnic ties are automatic, a “birthright” based upon one’s descent. According to Geertz (1973), primordialism is comprised of two primary views: “1) individuals have a single ethnic identity and 2) this identity is fixed in the present and future,” with where exactly this identity comes from remaining uncertain<sup>5</sup>. Therefore, while analyzing ethnic relations through a primordialist lens, caution is emphasized due to the idea that a level of commonality is inherently shared between members of an ethnic group. Though once popular amongst scholars, it has largely fallen out of favor in recent decades due to its essentialist nature. Constructivism as a school of thought arose largely as a counter to the primordialist stance. Providing a framework that allows for change, Chandra (2001) defines constructivism as being built upon two core

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<sup>3</sup> John L. Comaroff, *Ethnicity, Nationalism, and the Politics of Difference in an Age of Revolution*, in *THE POLITICS OF DIFFERENCE: ETHNIC PREMISES IN A WORLD OF POWER* 162 (1996). at 162.

<sup>4</sup> *Id.* at 164.

<sup>5</sup> CHANDRA, KANCHAN 2001 ‘Introduction’, *APSA-CP: Newsletter of the Organized Section in Comparative Politics of the American Political Science Association*, vol. 12, no. 1, p. 7 – 11. At 7.

views which directly oppose the tenets of primordialism: “individuals have multiple, not single, ethnic identities; and second, the identity with which they identify varies depending upon some specified causal variable. Changes in the value of these causal variables are likely to lead to changes in individual identifications<sup>6</sup>”. While there are several different constructivist approaches with regards to ethnic identity, the theory as a whole has been criticized by scholars such as Comaroff who bluntly states that “it is simply not a theory, merely a broad assertion to the effect that social identities are products of human agency<sup>7</sup>”. Meanwhile, instrumentalism, as the name implies, perceives ethnic ties to be little more than a tool, or, more appropriately, an instrument, that can and is used rationally for either group or personal gain, particularly in terms of political power<sup>8</sup>. Taken out of an economic and/or political context, instrumentalism gives little value to the concept of ethnicity. One can claim to be part of a group, but without the surrounding structure that provides a definition of said identification, the impact of those ties on the individual’s life have little meaning. Within the appropriate context, however, exactly which group or groups one belongs to may have a great level of influence over his life, be it in terms of affluence or power. One group is privileged over the others, which in turn solidifies personal attachment to identities, be it in support of the status quo or in opposition to it.

The polarity presented by the aforementioned theories has naturally given way to combination theories, most notably the idea of neo-primordialism, best described by John Comaroff (1996):

[Neo-primordialism] holds that ethnic consciousness is a universal potentiality which is only realized—objectified, that is, into an assertive identity—under specific conditions; viz. as a reaction, on the part of the community, to threats against its integrity or interest. From this perspective, ethnicity is not a thing in (or for) itself, but an immanent capacity which takes on manifest form in response to external forces<sup>9</sup>.

He then goes on to say that in order to successfully be used as an instrument, the instrument in question must have some unifying aspects that resonant with the people with whom support is trying to be garnered. Comaroff, however, is not explicitly

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<sup>6</sup> *Id.*

<sup>7</sup> Comaroff, *supra* note 3, at 165.

<sup>8</sup> Dodeye Uduak Williams, *How Useful are the Main Existing Theories of Ethnic Conflict?*, 4 ACADEMIC JOURNAL OF INTERDISCIPLINARY STUDIES 147–152 (2015). at 148.

<sup>9</sup> Comaroff, *supra* note 3, at 165.

advocating for neo-primordialism, or any single theory for that matter. Rather, he emphasizes the need to contextualize different scenarios, and that advancing a blanket discourse will routinely run an author into the trap of essentialism.

While this paper does not endorse a single theory of national identity formation to be applicable to every context, it does rely heavily on the theory of neo-primordialism in the analysis of the case study in Chapter III. Combining elements of primordialism and instrumentalism, this theory does not entirely discredit the primordial view that aspects of identity may feel intrinsic to the members of the collective in question. Rather, it simply asserts that race, ethnicity, nationality, et cetera, as well as social divides built upon these differences can only exist when the group as a collective faces an external threat, particularly one from an outside group. After all, an individual cannot choose where/into what social group they are born. At the same time, neo-primordialism acknowledges that international society is not a college admissions brochure in which everyone is multi-ethnic and happy for it. There are legitimate social divides that classify individuals into easily discernable groups that make it easier to gain political authority through an “us versus them” discourse. In order for such discourse to be derived, the social rifts must already be present within a given society.

Taking a neo-primordial approach to the powers of Medieval Europe, Anthony Marx looks at how the birth of the modern nation-state in Europe was achieved through the creation of a national identity that centered largely on the exclusion of others. A transition to capitalism brought with it new structures of governance and totally changed the relationships ordinary subjects had with those who ruled them. Whereas authority over the masses had previously come from a local, feudal lord, the shift to a modern concept of a centralized state brought many different ethnic/religious groups together across large swaths of territory. With these factions now compatriots, there had to be a way to unify the masses so that either those in power could maintain their position or so that any opposition could grow powerful enough to seize power for themselves. One of the ways of doing this was to capitalize upon rather than try to erode existing ethnic or religious differences within a state, sacrificing favor of a particular minority and using said minority as a basis against which to build popular support:

Those seeking greater popular allegiance and obedience to the state (or opposition to it), facing the imperative to build toward national cohesion, often found that amid conflict they could not do so easily or inclusively. They then fitfully embraced the logic of bolstering selective unity via exclusion, learning to focus that exclusion on heretics found within, resolving conflict accordingly. And to many at particular times, such sentiment felt 'natural.' Nationalism thus began to emerge by piggybacking on the passion of religious conflicts, which thereby cohered a core religious faith in the secular realm. Religion, both conflicts, over it and exclusions, accordingly, was then central to early nation-building as the most prominent collective 'focal point' of allegiance<sup>10</sup>.

For the first time, average citizens were seen as political units, and it was thus upon them to grant their governments, typically and in Marx's case studies, monarchs, legitimacy to rule. Looking at the European context may appear problematic for this piece, particularly given the fact that the countries Marx most engages with—England, France, and Spain—later became colonial powers, and so the historical context between Marx's cases and my own are quite different. As will hopefully be made clear in the following subsections, however, a similar tactic was employed in colonial Africa, the Ottoman Empire, and has lasted in various government structures to this day.

Marx's application of neo-primordialism to Premodern Europe is paralleled to Kelman's analysis of the Israeli-Palestinian conflict, wherein both ethnic groups have used negation of the other as a key source in deriving a collective identity. At the heart of Kelman's piece is the emphasis on the constructed nature of group identity. In order to explain how an ethnic/national group can define itself against others, there must be some artificial nature to the concept of group identity as a whole. Similarly, the ways in which relationships are negotiated—be they personal as a member of a particular collective negotiates and incorporates his identity into everyday life, between members of the collective with each other, between the members and their means of governance, or the ways in which members interact with outsiders—must have some level of fluidity.

Kelman explains:

[Identities] can be redefined because they are to a large extent constructed. To view national identity as a social construction does not imply that it is manufactured out of nothing. . . . Generally, the social construction draws on a variety of authentic elements held in common within a group. . . . [but] the social construction of identity implies a degree of arbitrariness and flexibility in the way the identity is composed (which elements are admitted into it and which is omitted from it) and in what its boundaries are

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<sup>10</sup> ANTHONY W. MARX, FAITH IN NATIONALISM: EXCLUSIONARY ORIGINS OF NATIONALISM (2003). at 77.

(who is included and who is excluded). These choices depend on the opportunities and necessities perceived by the elites that are engaged in mobilizing ethnonational consciousness for their political, economic, or religious purposes.<sup>11</sup>

Through the acknowledgment of identity as not just a social tool, but a political tool, it becomes apparent that the concept itself is not as concrete as people—and their political leaders—have a tendency to make it. Nationality and religion are considered to be fixed by the members who adhere to these identities, but history shows that this is not the case. Borders change, as does the world outside of those borders from whence other perspectives can be adopted by local populaces. Religion too, through becoming integral to national and/or cultural norms, can and does change as new interpretations of the faith are adopted and different tenets gain or lose importance among adherents.

Looking at the African continent's history of colonialism, Mahmood Mamdani (1996) explores the ways in which ethnic/racial/tribal distinctions amongst indigenous populations were used as a tool in establishing colonial rule. Situating himself in the debate between modernists, who advocate for a civil, rights-based society, and communitarians, who emphasize cultural/tribal sovereignty, Mamdani asserts that neither position can on its own provide a framework comprehensive enough for understanding the postcolonial African context. Prior to the colonial encounter, communities operated according to their own, naturally varied, structures, yet said structures were quite different from the modern, Eurocentric version of law seen throughout the continent today. During the period of colonial rule, the powers in question created a legal duality, one with a civil system governed by the colonial state ruling over the territory in question, and one that was overseen by and applied to natives<sup>12</sup>. While tribal affiliations had existed long before Europeans came to the continent, the duality implemented did not preserve local authority, but rather transformed it into a code that could be reconciled with the colonial legal systems.

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<sup>11</sup> Herbert C. Kelman, *National Identity and the Role of the "Other" in Existential Conflicts: The Israeli-Palestinian Case*, in *ISLAM, JUDAISM, AND THE POLITICAL ROLE OF RELIGIONS IN THE MIDDLE EAST* 61 (John Bunzl ed., 2004). at 65 – 66.

<sup>12</sup> MAHMOUD MAMDANI, *CITIZEN AND SUBJECT: CONTEMPORARY AFRICA AND THE LEGACY OF LATE COLONIALISM* (1996). at 22.

In order to secure power in a system in which nationals from the colonizing state were such a small minority, the colonizing state first had to ensure that any potential unity amongst the indigenous populations in an area was fractured. Thus, a system of customary law was established and applied along racial lines<sup>13</sup>, with explicit content of the law differentiated according to the standards of the tribes in question. Playing upon ethnic pluralism—for which, it should be noted, the groups in question were not necessarily in conflict or saw themselves as “othered” from their fellow indigenous groups—was a strategic move, in that “the way to stabilize racial domination (territorial segregation) was to ground it in a politically enforced system of ethnic pluralism (institutional segregation), so that everyone, victims no less than beneficiaries, may appear as minorities<sup>14</sup>”. Local populations, now fragmented, then became preoccupied with preserving their identities against other indigenous groups, rather than the indigenous population as a whole forming their collective identity against the colonial regime, collective action which may have posed a threat to the ruling colonial power. The debate over the degree to which former colonial states should “modernize” is an intense one, yet Mamdani’s analysis highlights that no matter how much one disavows Western legal ideals, they will still permeate into the most communitarian of societies as the communitarian, tribal institutions that exist today are too products of the colonial enterprise<sup>15</sup>.

On a macro level, nationalism/national identity is merely another means of social categorization, so to understand it, it is important to understand the nature of collective identity, and with it, the nature of individual identity as well. After all, no group can exist without a collection of individuals both to comprise the group, and to comprise other groups from which the first can define themselves. According to Côté and Levine, “difficulties with identity formation processes are so widespread they are now being considered ‘normal’ in many respects....people lack a sense of self-definition rooted in a community of others, which was the basis of human identity throughout history<sup>16</sup>”.

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<sup>13</sup> *Id.* at 109 – 110.

<sup>14</sup> *Id.* at 6.

<sup>15</sup> *Id.* at 26.

<sup>16</sup> JAMES E. COTE & CHARLES G. LEVINE, *IDENTITY, FORMATION, AGENCY, AND CULTURE: A SOCIAL PSYCHOLOGICAL SYNTHESIS* (2002). at 2.

According to the authors, the history of human society can roughly be divided into three categories—premodern, early modern, and late modern—for which individual identity and the social prescriptions of such interacted. In premodern societies, i.e., prior to industrialization, identity was ascribed to the individuals who lived within a given society. As populations became increasingly urban, social identity became something one sought to accomplish, to work towards in order to assume an acceptable role within the social constructs in which he lived. In the period in which we currently live, the late modern, societal expectations of the role one fills is managed with the personal decisions about how we live our lives. Identity as part of a group, as a culture, is now often seen as a burden rather than a goal. To quote Côté and Levine directly:

In late modern societies, therefore, social identities are much more precarious than ever before. As opposed to being a birthright, or a sinecured social achievement, one's legitimacy can be continually called into question. In order to find a social location to begin with, one often has to convince a community of strangers that one is worthy of their company, and their acceptance can be challenged at virtually any moment<sup>17</sup>.

Our society, the authors argue, is currently image-oriented, implying that it is not our own perceptions of our identity that matters, but rather the way those around us perceive it. Identity as the individual expresses it often conflicts with identity as those around the individual prescribe it must be. This may not be an entirely new concept in that the social context is what has always assigned value to identity. But in the postmodern era, individuals, given access to seemingly unlimited perspectives, feel that they must prove themselves as part of the collective because now, everyone is aware that not being part of said particular collective is an option. The anxiety generated by the prospects of not “fitting in” makes it all the easier for states weaponize identity to turn social factions against one another.

But—typically—law and policy are not determined by individuals acting as individuals. This must be done on a group level. The two realms, the individual and the collective, have long been presented as dichotomous to one another, but are also highly dependent on one another as no group can exist without individual members. For large groups defined by characteristics such as nationality, ethnicity, and/or religious affiliation, the individuals themselves help to shape the collective expression of their

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<sup>17</sup> *Id.* at 126.



group while simultaneously having their very individualities shaped by the standards of the collective(s) to which they belong<sup>18</sup>. This is why the cultural standards of a society can change. Change, however, becomes more difficult when criteria for membership requires adherence to certain values or way of life, as is the case with religion, where there are rules governing everything from marriage to financial regulations to dietary restrictions. There is less room for challenging standards when membership is based upon behavior rather than birthright, as is the case when social divisions are based upon ethnicity or race. Modern nationalism, particularly in heterogenous countries, and even more so when there is a perceived threat against the nation, plays by similar rules. The idea of “our culture”, “our tradition”, that “this is who we are, this is what has been done, and because it has been done this way, it must continue to be done as such” is powerful precisely because the consensus of the collective helps to shape the personality of the individual. In ensuring that being part of the collective requires acting in a certain manner, the status quo is better solidified, so long as the individuals who make up said collective prioritize continuation of their “membership” over opposing the standards in place.

Though it was long predicted that modernity would bring about the end of the division caused by nationalism, looking at the world today, it is evident that the concept has survived. Seemingly as well, the weapon of nationalism once utilized solely by armies of the elite—i.e., monarchies and colonial powers—has spread to the general public, allowing it to become a populist opposition tool. Writing towards the end of the Cold War, Anderson notes that “since World War II every successful revolution has defined itself in national terms...and, in doing so, has grounded itself firmly in a territorial and social space inherited from the pre-revolutionary past<sup>19</sup>”. Positioned somewhere closest to instrumentalism on the spectrum of theory of nationalist formation, Anderson removes the nefarious connotations from his view. Admitting the artificial, or imagined, nature of communities, he refrains from

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<sup>18</sup> Tom Postmes et al., *The Dynamics of Personal and Social Identity Formation*, in *INDIVIDUALITY AND THE GROUP: ADVANCES IN SOCIAL IDENTITY* 179 (2006). at 187.

<sup>19</sup> BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (1983). at 2.

using language implying that such social groups were “invented” rather than “created”. The former implies that such construction was wrong, and as a result, that there is a right way for them to form. Instead, he chooses to believe there are merely differences in “the style in which they are imagined<sup>20</sup>” that can be attributed to cultural roots present in a particular group. Regardless of the nature of their creation, however, the idea that identity belongs to masses as well as the elite is quite an empowering one, even though it means the exact same thing according to Anderson as it does to Marx: that identity can be used as a political tool. It is an artificial concept with very real consequences.

We are far from the end of nationalism, yet a social shift is occurring. Having explored the evolution of individual identity over recent centuries, we can now track the changes in identity as a collective enterprise over more or less the same time frame. Anderson comments on this extensively as well. While collectivism currently manifests itself most commonly on the level of the nation-state, this has not always been the case. Through and into the Middle Ages, across the known world, borders, though in existence, were weak, and governates often blurred into one another. The people who lived in these governates were governed over, but not actively considered political entities like the individual citizen is today. Those who ruled over them did not have to give much weight to the will of the people, as it was understood that the right to rule came from God/gods, in whatever form was popular in the area in that given time period. Commonly understood languages, at least amongst the elite, ruling and literate classes, were those of religious texts. Latin dominated the Christian World over the vernacular French, Italian, and Spanish. Arabic unified the Islamic World, and Confucianism, though not a faith per se, spread Chinese throughout much of East Asia. This is why, to borrow an example directly from Anderson, that medieval artwork portraying scenes from the Bible often feature subjects with European features and style of dress despite originally occurring in modern Palestine. The concept of “us versus them” was not based so much upon territoriality, but upon conscious belief.

However, around the beginning of colonization, the use of a lingua franca uniting religious communities sharply declined in popularity, replaced with vernacular languages

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<sup>20</sup> *Id.* at 6.

spoken only in a certain geographic area<sup>21</sup>. A greater reliance on less commonly understood languages required the translation of texts previously untranslated, religious texts being among them, which further enforced the new concept of a community based upon location as a common location equaled a common language or dialect. This community was called the nation, and it continued temporally:

The idea of a sociological organism moving calendrically through homogenous, empty time is a precise analogue of the idea of the nation, which also is conceived as a solid community moving steadily down (or up) history. An American will never meet, or even know the names of more than a handful of his 240,000,000- [now 330,000,000] odd fellow-Americans. He has no idea of what they are up to any one time. But he has complete confidence in their steady, anonymous, simultaneous activity<sup>22</sup>.

It is not surprising that nationalism took hold at the same time as individualism. Whereas community based upon religion knowingly accepted a fixed hierarchy—God appointed a worthy leader to which common people answered too—a community based upon geography/ethnicity allowed common people the hope of rising in social status. This newfound hope was occurred simultaneously with the rise of capitalism. As the social order was no longer predetermined, responsibility was placed on the individual to make his place in his national society. This was the likely catalyst behind the shift from identity being prescribed—“it is God’s will you be disenfranchised”—to something one sought to achieve—“if you work hard enough, you will no longer be disenfranchised”. Under the nation-state, individuals were promised a chance to rise through the levels of the hierarchy while still clinging to the same promise of continuity originally only offered by religion.

During pre- and early modern times when collective identity was either prescribed or something that a person aimed to be part of, the price of conformity, was worth the sense of belonging it brought, if it were even ever discovered that an alternative existed. The individuals wanted to be part of a collective, specifically a national or religious group and usually the collective to which they were born. Whether it be capitalism

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<sup>21</sup> This paragraph and the one immediately preceding it are largely a summary of Chapter 2 of Anderson’s *Imagined Communities* (*Supra* Note 19) which can be found at Pages 9 – 36. The exact reasoning for the shift from religious languages to the vernacular is based in part both on globalization (explored further in that same chapter) and on marketing by publishing companies in the 16<sup>th</sup> century (outlined in Chapter 3).

<sup>22</sup> *Id.* at 26.

spawning a more individualistic society, individual ease of communication and travel, bringing with it access to a range of different perspectives, or global cooperation on a macro level, there is no longer the mass loyalty to the preexisting norms. Individual attachment to the collectives an individual is born too is weakening, so too are the collectives as collectives. The rates of active membership turns out to be less than the demographic projections of previous generations would have indicated. The limited amount of members left would likely also be more traditional, seeing as changing the standards of the group is often more difficult than leaving the group entirely, which in turn would make an out-reach approach to garner new membership even more difficult than it may have been had more moderate stances been present.

### ***B. The Regulation of Marriage***

As borders became stronger, so too did those who ruled over them. Emphasis on kingdom boundaries combined with the new market regulations brought governments control over an entire “public” sphere. Conforming to this framework, everything considered outside of sovereign power then became “private”<sup>23</sup>. Family was considered the most private domain<sup>24</sup>, for it is through the family both physical reproduction and the reproduction of identity take place. Modern scholarship however no longer believes the public and private realms to be that distinct from one another<sup>25</sup>, and the relationship between the family and the state underscores how intimately connected the two spheres are. Family law exceptionalism is the idea that the “family and family law are often treated as occupying a unique and autonomous domain...they are unique because they preserve (against modernity and/or the global or foreign) the traditional, the national, the

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<sup>23</sup> Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1423 (1982). at 1423.

<sup>24</sup> Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1349 (1982) at 1355.

<sup>25</sup> *See Id.*; Gurpreet Mahajan, *Reconsidering the Private-Public Distinction*, 12 CRITICAL REVIEW OF INTERNATIONAL SOCIAL AND POLITICAL PHILOSOPHY 133 (2009).

indigenous<sup>26</sup>”. Yet, the family is regulated. Members of families are still individuals tied to government institutions and the market<sup>27</sup>. The very formation of the family too is regulated through the institution of marriage. If the private sphere refers to elements of society outside the control of the state, then any element the state does have authority over cannot be within the private sphere.

The cornerstone of nearly every family law system is a basis upon which to construct the family, either marriage or some equivalent form of relationship recognition. Any system that grants a formal system of relationship recognition implements parameters regarding what combinations of partners are eligible for that recognition. Apart from being subjected to anti-miscegenation laws, prior to the 1870s, marriage was once considered a private matter with sparse government oversight. Little to no documentation of the union was the norm, and courts throughout the United States presumed marriage in cases where no evidence for or against the relationship’s validity was present<sup>28</sup>. At the time, this system of not having a system most benefited the state in its protection of public morality—aligning with national identity and thus a means of control—while serving economic interests. Upon the cessation of financial support from the male breadwinner, such as in the case of his death, otherwise unwed mothers and illegitimate children would only be allowed to inherit, and therefore sustain themselves, if the presumption of a formal union was present. Seeing as inheritance is a private matter involving no payout on the part of the state, ensuring the continuation of such private economic support<sup>29</sup> prevented countless women and children from becoming destitute and/or the state’s problem, all while maintaining the social standard said cohabitation and illegitimate children were immoral.

But marriage, even if considered private, has long been restricted to couples whose social groups were supposed to stay distinct. A common element of regulations on who could marry whom is that they were adopted in response to a perceived social threat.

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<sup>26</sup> Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 THE AMERICAN JOURNAL OF COMPARATIVE LAW 753 (2010). at 754.

<sup>27</sup> *Id.* at 761 – 762.

<sup>28</sup> Matthew J. Lindsay, *Reproducing a Fit Citizenry: Dependency, Eugenics, and the Law of Marriage in the United States, 1860-1920*, 23 LAW & SOCIAL INQUIRY 541 (1998). At 547.

<sup>29</sup> *Id.* at 552.

At a time in which economic growth was paramount to capitalist, newly industrial societies, the makeup of the family became more politically relevant, more restricted, more about society at large, and therefore more public. Increasing rates of poverty, medical knowledge on heredity ailments and cognitive impairments, as well as more frequent interactions between members of different racial, ethnic, and religious groups led to fees for registering a marriage and prohibitions on marriages between certain types of people, such as the mentally handicapped and interracial couples<sup>30</sup>. The reason behind this shift is best explained by Michel Foucault:

One of the great techniques of power in the eighteenth century was the emergence of ‘population’ as an economic and political problem: population as wealth, population as manpower or labor capacity, population balanced between its own growth and the resources it commanded....a ‘population’, with its specific phenomena and its peculiar variables: birth and death rates, life expectancy, fertility....At the heart of this economic and political problem was sex<sup>31</sup>.

As scientific discourse crafted widely accepted definitions of “normal” and “abnormal” cognitive and behavioral ability<sup>32</sup>, ensuing that such conditions did not enter the gene pool became a major sociopolitical concern. New knowledge of the hereditary nature of certain conditions coupled by the economic disadvantages faced by those who had them made it within the interests of the state to prohibit the propagation of abnormal genetics. A group previously somewhat integrated into greater American society suddenly found themselves othered, deprived of a privilege that had been a right prior to government regulation.

Anti-immigration rhetoric during this same time period lead to a social panic of intermarriage between American citizens and new immigrants, lest the American identity be lost, as well. Bemoaning the decline in birth rates of the native-born white population at the turn of the century, President Theodore Roosevelt wrote ““It is lamentable...to see this Puritan conscience, this New England conscience, so atrophied, so diseased and warped, as not to recognize that the fundamental, the unpardonable crime against the race is the crime of race suicide<sup>33</sup>”. The fear of losing one’s cultural identity to assimilation is not unique to the United States at this period either, and much of the language invoked is

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<sup>30</sup> *Id.* at 569 (Handicapped), 546, Note 7, (Interracial).

<sup>31</sup> MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* (First American Edition ed. 1978). at 25.

<sup>32</sup> *Id.*

<sup>33</sup> *Quoted in Lindsay, supra* note 28. at 566.

still the same, as will be explored in more detail later. For the sake of this section, I wish to juxtapose Foucault's exploration of the people as a population, as well as need for racial purity, with a quote by Rachel Moran, a scholar on the rationale behind anti-miscegenation laws in the United States:

Here, I would first like to focus on a time of great social and sexual ferment in the United States, the period in the late 1800s and early 1900s when America was experiencing rapid industrialization and urbanization. So long as most Americans lived in small, rural communities, neighbors could keep a close eye on sexual liaisons, and wedding banns would give the entire village a chance to reflect on the soundness of a match. As the population shifted to large, impersonal cities, these informal ways of regulating sex and marriage broke down. Suddenly, anonymity gave urban Americans unprecedented opportunities for sexual experimentation and subjected them to unprecedented dangers of sexual predation and marital fraud<sup>34</sup>.

Demographics, not necessarily relating to ethnicity, became a matter of state economic policy, at the same time urbanization brought threats to traditional moral standards. Populations grew to numbers never seen before, with population centers growing even faster. For the first time, the state risked having too many people while they had previously been worried about having too few. The lack of community surveillance combined with new governmental interests lead to surveillance through law. One of the ways in which to do this was through making marriage a legal institution.

When marriage became regulated by the state, some of the first and most widespread restrictions implemented was that on marriage between people of different races. The legal prohibitions sought to accomplish two goals: 1) permanent segregation of the races and 2) continued subordination of politically targeted minority groups. Within the American context, many states adopted anti-miscegenation laws aimed at preventing marriages between black and white individuals, as well as couples comprised of one white and one Asian partner. Anti-miscegenation laws targeting Native Americans and Latinos were rare in the former case and non-existent in the latter<sup>35</sup>—though stigmas persisted that may have impacted how commonly such marriages actually occurred—intentional discrepancies crafted to service social agendas. Native Americans and Latinos were indigenous racial groups in the Americas, and as such, it was in the interest of white

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<sup>34</sup> Rachel F. Moran, *Love with a Proper Stranger: What Anti-Miscegenation Laws Can Tell Us about the Meaning of Race, Sex, and Marriage*, 32 HOFSTRA LAW REVIEW 1663 (2004). at 1672.

<sup>35</sup> *Id.* at 1664.

society for those races to integrate into the white establishment. Early Asian communities in the continental United States were primarily Chinese male migrants, allowed into the country on a short-term basis to fulfill a need for labor. As such, policies were implemented to ensure that the men would eventually leave the country, including forbidding their marriage to white women<sup>36</sup>. The most strict, and most common, laws against interracial marriage were aimed at those between blacks and whites, the result of centuries of slavery that ingrained a monstrous image of black men into the minds of white Americans from which white women must be protected, both for their sake as individuals and for the future of the white collective. In codifying these stigmas into law, they were legitimized, and thus the inferiority of blacks and the necessity of segregation were further cemented into American institutions.

The debate over the recognition of same-sex marriage has raged in Western political systems since the late 1990s. While I try not to discuss these unions too in-depth in attempt to avoid conflation between productive and non-productive relationships, the rationale behind restricting access to the institution of marriage indicates that marriage is more than simply a means of producing the next generation. It is precisely *because* these relationships—presuming monogamy and a lack of medical intervention—cannot produce children. If protecting the social conditioning of children were the only reason for restricting who an individual is allowed to marry, same-sex couples would have been able to secure access to the institution much easier than they did, with debates surrounding adoption rights and access to reproductive technologies being more highly contested than marriage equality. Not having children equals no flaw in conditioning, meaning that there is no ground to prohibit people of the same sex from marrying one another unless marriage as marriage means something greater than marriage solely for the purposes of childrearing. Exploring the rationale behind opposition to expanding access to the institution of marriage, François compares prohibitions of same-sex marriage to prohibitions on marriage between slaves:

My thesis in this Article is that the ban on slave marriage was rooted in a fundamental refusal to provide social recognition to the humanity of slaves. By contrast, opposition to interracial marriage had less to do with a denial of the humanity of the individuals involved, than with a desire to defend against the political and economic threat to white

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<sup>36</sup> *Id.* at 1666.



supremacy that interracial marriage posed....such opposition [to same-sex marriage], like the ban on slave marriage, is rooted in a refusal to make equal space for gay couples in our national identity.<sup>37</sup>

Seeing as prior to emancipation, slaves were not considered legal persons, they could not enter into contractual arrangements, including formalized marriages. Naturally, family formation occurred, but the family in question had no protections or status, with nuclear families often being forcibly separated or even constructed<sup>38</sup>. Upon emancipation, however, former slaves were often encouraged to marry in order to conform to the moral order of the country<sup>39</sup>. Quickly, formal marriage and laws concerning the family became important to the rights of newly emancipated persons, as access to such institutions confirmed their personhood status, serving as yet another step to full citizenship while ensuring that these new legal persons conformed to the collective moral order.

While the historical treatment of slaves and homosexuals is clearly very different, a long lack of legal status is shared between them. Homosexuals—aside from those who were also slaves—have always enjoyed legal personhood, but so long as their sexual activity was illegal, any relationship also lacked the chance for legal status. Seeing as the ability to form a family had such an established history as a basic right of persons, being barred from the institution of marriage was direct comment to their inferiority within the social hierarchy. Legal persons, yes, but not quite deserving of the rights of full legal persons. With no single “emancipation” to speak of, the timeline of the marriage equality movement aligns with François’s comparison. In 2003, the Supreme Court decision of *Lawrence v. Texas* struck down any state law criminalizing consensual same-sex activity. The following year, Massachusetts became the first state in the country to legalize same-sex marriage. Barely more than a decade later, in 2015, same-sex marriage was legalized in every state that had not already done so. It was a quick legal development that followed a much more gradual cultural shift, following a pattern similar to the marriage rights of slaves. The marriages of former slaves, though reproductive, were also similar to same-sex marriages in that they did not pose the same demographic threat as interracial

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<sup>37</sup> Aderson Bellegarde Francois, *To Go Into Battle with Space and Time: Emancipated Slave Marriage, Interracial Marriage, and Same-Sex Marriage*, *The Journal of Gender, Race & Justice* 105 (2009). At 108.

<sup>38</sup> *Id.* at 144.

<sup>39</sup> *Id.* at 144 – 145.

marriage because anti-miscegenation laws were already in effect, thus preventing newly emancipated former slaves from marrying outside their race, ensuring that the racial groups within American society would continue as they had for centuries prior. Unlike the previous restrictions discussed, prohibitions on both slave and same-sex marriages were about what other peoples' children thought—i.e., that the next generation would view these classes as people with the same disdain their parents did—than the actual children being produced.

On the topic of same-sex marriage is too the topic of the alternative to marriage long proposed and adopted in many places: civil unions, domestic partnerships, and reciprocal beneficiaries. More or less the same legal arrangement, civil unions traditionally offered the greatest amount of rights to couples, followed by domestic partnerships and then reciprocal beneficiaries<sup>40</sup>, the third having been present in only one state, Hawaii, which was also the first state to extend any kind of relationship recognition to same-sex couples. The exact rights awarded by these unions varied depending on the state—or country, as such alternative arrangements to marriage were not unique to the United States—but included at least some rights previously restricted to married partners such as hospital visitation and funeral leave<sup>41</sup>. This approach, long seen as a compromise on the political issue of marriage equality, was short-lived, only lasting in its various forms for a total of 22 years. Even in states where civil unions were equal to marriages in terms of rights and duties, such as Connecticut<sup>42</sup>, it was marriage, equal to the institution awarded to opposite-sex couples both in name and practicality, that the Supreme Court mandated be extended to same-sex couples<sup>43</sup>. When the family is defined by marriage according to the law, not to mention the real, though hard to quantify significance of being *married*, anything less than marriage is not equal to marriage, specifically when the very reason behind the existence of these alternative structures was to deny what was already in existence.

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<sup>40</sup> Ian Curry-Sumner & Scott Curry-Sumner, *Is the Union Civil? Same-Sex Marriages, Civil Unions, Domestic Partnerships and Reciprocal Benefits in the USA*, 4 UTRECHT LAW REVIEW 236 (2008). at 243, 245.

<sup>41</sup> *Id.* at 244 – 245.

<sup>42</sup> *Id.* at 255.

<sup>43</sup> *Obergefell v. Hodges*, 576 U.S. 644 (2015).

### *C. The Millet System*

Throughout much of the former Ottoman Empire, a millet-like approach remains in place. Originally adopted to solve a logistical problem of multiple religious communities over vast swaths of territory while maintaining Islamic hegemony, such an approach puts marriage and other elements of personal status law under the jurisdiction of the religious law to which the individual in question belongs. In cases where petitioning parties belonged to different religions, Islamic law would apply, and the case would be handled before the *shari'a* courts. While protection of the rights of religious minorities may not have been the primary rationale behind the millet system, granting communities a degree of self-rule may in and of itself provided some protections to them, at least at the collective level<sup>44</sup>, particularly when compared to the approach by European powers at that time. However, allowing minorities to exist does not mean that they were treated equally, and deeply entrenched social hierarchies existed between the factions in a given area. In systems that continue to utilize a millet style approach, questions over the fairness of such hierarchies, the rights of the individual(s) who make up the collective, as well as certain tenets of enforced religious law are matters of intense debate.

Even in countries that have done away with the millet system, its remnants remain powerful. Tracing the history of the Church's power from pre- to post-independent Greece, Tsoukala highlights how in order to become independent, Greeks needed a national culture behind which to mobilize. As the Orthodox Church was the only national institution that had enjoyed some degree of autonomy under the Ottoman Empire, it quickly became conflated with the Greek Nation and culture<sup>45</sup>, and was thus able to use

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<sup>44</sup> Ergun Cakal, *Pluralism, Tolerance and Control: On the Millet System and the Question of Minorities*, 27 INTERNATIONAL JOURNAL ON MINORITY AND GROUP RIGHTS 34 (2020). at 36.

<sup>45</sup> Philomena Tsoukala, *Marrying Family Law to the Nation*, 58 THE AMERICAN JOURNAL OF COMPARATIVE LAW 873 (2010). at 881.

this tradition to secure authority upon independence. Legitimacy and power were both further solidified by the new lack of alternative family law. Under Ottoman Rule, conversion had been option for Greek Christians and to avoid losing too many followers, the Church had to be less strict in its application of religious doctrine<sup>46</sup>. The Church was freed from these constraints once it no longer had to answer to an authority of a different faith or its citizenry being part of a more diverse greater population. With the Church's new monopoly over family law, as well as the newfound power that culture, i.e., the Church, held in the post-independence era, going forward, "family law became a domain in which any reform had to be justified in terms of tradition or modernity<sup>47</sup>". As the country began to integrate into a pan-European structure in the 20th century, the idea that Greece too belonged to a general European structure of civilization served as a justification for reforms made in the realm of family law, such as the creation of a civil system of marriage and the abolition of the dowry, both in 1983<sup>48</sup>. No matter which culture Greeks belonged to—a Greek or an umbrella “European” one—it appears as if an idea must be established in history and tradition in order to be considered legitimate.

For other former Ottoman countries, the political power of the religious authorities is even greater than in Greece, as religion played the same role in nationalist movements while retaining their jurisdiction over personal status matters upon formal statehood. Not merely a legal leftover from a previous regime, in continuing to give the religious authorities such legal power, the state actively condones unity of religion and state, touting group rights while simultaneously having policies that supersede some tenets, even the tenets of the majority/most influential religious authority. These states have the authority to place restrictions on marriage, including minimum age requirements and the prohibition of polygamy. A public matter in such systems, there is still a legal hierarchy. Therefore, like many elements of family law, religion here too becomes a public matter. The state could easily adopt a system that would give its citizens a greater degree of freedom of choice, both in terms of their partner and under what laws their marriage would be subjected to. The fact that they do not, coupled by the fact that most

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<sup>46</sup> *Id.* at 898.

<sup>47</sup> *Id.* at 899.

<sup>48</sup> *Id.*

institutionalized religions in the region do not permit interfaith marriages, means that the state creates a barrier to the institution of marriage on the basis of religion. In simple terms, it is religious discrimination.

#### ***D. Intermarriage's Threat to Identity by Exclusion***

Thus far, terms such as “intermarriage” and “endogamy” have been used quite generally for a specific reason. According to Törngren, Irastorza, and Song, literature on intermarriage can be divided into three categories: likelihood and patterns of intermarriage, intermarriage and migration, and intermarriage and social integration<sup>49</sup>. This paper will focus primarily on the third category, with elements of the first being incorporated for statistical purposes. Within each of these scopes, literature is often conflicting, particularly with regards to the impact such crossing of boundaries has on the individuals' status within his or her society's social hierarchies. Depending on the field of study through which research is conducted, a variety of different terms can be employed to describe the exact difference being analyzed, such as “interfaith”, “interracial”, “transnational”, and “cross-cultural”<sup>50</sup>. One of the main issues with analyzing intermarriage's role in the formation/evolution of identity is the task of determining exactly which combination of partner backgrounds are deserving of the “inter-” prefix. This, naturally, depends on the context in question, seeing as intermarriage “is not a question of what, but also when and where”<sup>51</sup>. Taking into account the level of tension that exists between groups and the way in which the system in question defines concepts of race and ethnicity, dividing lines between social factions can take place across a wide variety of cleavages off of which endo- and exogamy can be defined. There too can be varying results when looking at intermarriage and the absorption of immigrant groups into a native society as opposed to intermarriage and the social cohesion between two

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<sup>49</sup> Sayaka Osanami Torngren, Nahilkari Irastorza & Miri Song, *Toward Building a Conceptual Framework on Intermarriage*, 16 ETHNICITIES 497 (2016). at 503.

<sup>50</sup> *Id.* at 500 – 501.

<sup>51</sup> Dan Rodriguez-Garcia, *Intermarriage and Integration Revisited: International Experiences and Cross-Disciplinary Approaches*, 662 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL Science 8 (2015). at 10.

distinct native populaces. Similarly, with the decline in marriage in certain parts of the world, the term has also expanded to include other means of long-term coupling, particularly with regards to relationships which could result in the propagation of identity.

The exact implications high rates of intermarriage can have on a society too vary a great deal depending on the society in which the marriage is occurring as well as the specific demographic variations the couples represent, as is highlighted by the juxtaposition present in my introduction. In areas with a deep social/political divide between certain factions, the mixing of said contentious factions is viewed less favorably than in countries where there is a higher degree of diversity and integration of different groups with one another. In the former systems, intermarriage, and thus the mixing of the various identities, is seen as integration, a term that brings with it both negative perceptions in that those integrating are losing a key part of their identity—this being to some an inherently negative thing<sup>52</sup>—as well as ultraistic depictions of a lack of prejudice between the social groups. Typically applied to immigrants assimilating into their new country of residence, I prefer to use the term “integration” more loosely, extending it to local groups interacting with one another to a degree in which a single national identity is created rather than having multiple different identity groups locked into a series of competition with and negation of the other. In Rodriguez-Garcia’s compilation of existing scholarship, intermarriage has been deemed “the ‘litmus test’ of immigrants’ and ethnic minorities’ assimilation into mainstream society<sup>53</sup>,” and that “the increase in intermarriage across national, cultural, racial, and religious boundaries worldwide could be seen as a sign of the diminishing barriers to social interaction across groups and as an important step in the lessening of ethno-racial distinctions in forthcoming generations<sup>54</sup>”. While it is emphasized in Rodriguez-Garcia’s piece that the universality of these claims has yet to be established by the dominant literature, it at least has been documented in some contexts. Therefore, when a state does not even make intermarriage an option, it

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 13.

<sup>54</sup> *Id.*

restricts any potential upward mobility that might ensue by the disenfranchised class, thus entrenching inequalities between the social groups.

Looking at the trends of intermarriage on identity amongst groups who are both native nationals, there is consensus within academia that while it can lessen inequality along racial/ethnic lines, it can also perpetuate inequality along other cleavages<sup>55</sup>. Typically, exogamous unions along racial or ethnic lines are still endogamous in terms of socioeconomic class or educational attainment. As traditionally disenfranchised social or ethnic groups disproportionately comprise lower socioeconomic classes and levels of education, “those among the disadvantaged ethnic group who [are left to] inmarry will be less educated<sup>56</sup>,” in turn producing less educated offspring. Seeing as intermarriages along racial/ethnic lines are inmarriages along those of class or level of education, there is justification for the minorities within a system to support endogamy as a means of cultural preservation. Looking at the children of interracial couples, black-white, Native American-white, Asian-white, and Hispanic-white, all combinations of parents typically denote their children’s races as mixed rather than prioritizing one parent’s race over the other. Aside from this majority, in all parental pairings but black-white, more parents identified their children as white as opposed to the minority race present in the family<sup>57</sup>. For Hispanics—who are a multiracial ethnic group—and Native Americans, the two racial groups with the fewest historical marital restrictions, “education is strongly linked to identifying children as ‘white’<sup>58</sup>”, identifying the next generation with the most privileged faction. Educational attainment may thus be able to serve as a bridge between racial/ethnic groups within a heterogenous society, serving as a tool for social mobility.

The ideas explored in examining intermarriages along racial/ethnic lines can serve as an indicator when the population is divided by religion, even if the Western concept of race is not as politically relevant within that particular system. The former seat of the Ottoman Empire, what is now Turkey, did away with the approach outlined by the millet

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<sup>55</sup> See Barbara S. Okun & Orna Khait-Marely, *The Impact of Intermarriage on Ethnic Stratification: Jews in Israel*, 28 RESEARCH IN SOCIAL STRATIFICATION AND MOBILITY 375 (2010). and *Id.*

<sup>56</sup> See Okun & Khait-Marely, *supra* note 55, at 378.

<sup>57</sup> Daniel T. Lichter & Zhenchao Qian, *Boundary Blurring? Racial Identification among the Children of Interracial Couples*, 677 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 81 (2018). at 85, Table 2.

<sup>58</sup> *Id.* at 89.

system soon after the Empire's collapse. At this time, the new republic was struggling to modernize with its smallest amount of territory in centuries. Though family law was secularized and interfaith marriages legally possible, the ethnoreligious approach to Turkish nationality ensured that non-Muslim communities and their members retained statuses of inferiority. As time went on, religion once again became political, largely as a means to secure votes<sup>59</sup>. Non-Muslim Turks, out of an increasing feeling of isolation, emigrated in droves, with ever dwindling numbers further cementing their "othered" status. Remnants of minority communities turned insular in response to perceived threat of erasure. Interfaith marriages thus became undesirable for all parties. For Muslim Turks, marrying a non-Muslim would mean marrying someone of questionable loyalties, as though they had full Turkish citizenship, non-Muslims were not socially considered to be fully part of the Turkish nation, literally referred to as "foreigners"<sup>60</sup>. For the minority partner, marrying into Muslim society would mean a demographic hit to already diminished numbers. In 1962, Ulku Adatape, daughter of Mustafa Ataturk, stirred national controversy over her marriage to a Jewish man. Though her husband was a Turkish citizen, had served in the military, and had done nothing to warrant suspicion of his loyalty, he was still portrayed as a foreigner, and their marriage equated to Ulku turning her back on both her country and her father's legacy. Their marriage, involving not just any Turkish Muslim girl, but the daughter of such a beloved national leader, directly questioned the politically popular notion that Turkey was an inherently Islamic country, and that as such, in order to be Turkish, one had to be Muslim.

Whether based upon race or religion, there are commonalities in the systematic usage of regulating who can marry whom. Since 1933, it has been "illegal for Egyptian diplomatic and consular representatives (as well as administrators in the delegations and consulates and students enrolled in the diplomatic and consular corps) to marry non-Egyptian women", a precedent that permeated into the 2014 Constitution which stipulates that presidential candidates may not be married to a foreigner, despite the fact that such a provision's existence in earlier versions of the document would have voided the

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<sup>59</sup> Sinem Adar, *Religious Difference, Nationhood, and Citizenship in Turkey: Public Reactions to an Interreligious Marriage in 1962*, 24 *THE HISTORY OF THE FAMILY* 520 (2019). at 529.

<sup>60</sup> *Id.* at 527, 530.



candidacy of Egypt's three longest-serving presidents<sup>61</sup>. Egypt too limits marriage along religious lines due to its adherence to a millet-like system. Turning away from the millet system for a moment, regimes of various systems of governance have taken it upon themselves to determine which familial makeups are and are not acceptable. The policies drawn along national lines included several European countries, such as the Netherlands, in which women who married foreign men would lose their Dutch citizenship<sup>62</sup>. It should also be noted that in certain cases, governments have encouraged intermarriage, also a means of controlling future demographics. Following independence from Spain, Mexico attracted many white foreign investors in sparsely populated areas of the country. To ensure that these investors did not leave after they had profited off the land, thus costing the economy everything it had hoped to gain from the initial investment, Mexico made acquiring citizenship and trade opportunities available to investors who married local women<sup>63</sup>.

The majority of pluralist democratic societies view ethnicity and ethnic differences of its citizenry in one of two ways. By making it private, as is common in liberal democracies where all citizens are treated equally, or by making it public, in that groups are recognized and mechanisms such as power-sharing implemented as a guard against ethnic conflict<sup>64</sup>. A few countries, however, have democratic systems, yet strongly favor a single ethnic group. Only a handful of countries have ever embraced the "ethnic democracy" model, yet those included in this short list are Estonia, Latvia, and Israel<sup>65</sup>. Due to the bias of such structures, it is expected that maintenance of the dominate group's hegemony would be of social and political importance. While there may be several ethnic factions within a country, the majority only sees two: themselves and everyone else, who becomes a uniform "other" subjected to unequal treatment<sup>66</sup>.

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<sup>61</sup> Hanan Kholoussy, *The Private Affairs of Public Officials: Mixed Marriage and Diplomacy in Interwar and Post-Mubarak Egypt*, 54 *DIE WELT DES ISLAMIS* 483 (2014). at 484 – 487.

<sup>62</sup> *Id.* at 490, Note 26.

<sup>63</sup> Moran, *supra* note 34. at 1669.

<sup>64</sup> Sammy Smooha, *The Model of an Ethnic Democracy: Israel as a Jewish and Democratic State*, 8 *NATIONS AND NATIONALISM* 475 (2002). at 475 – 476.

<sup>65</sup> Mosehe Berent, *The Ethnic Democracy Debate: How Unique is Israel?*, 16 *NATIONS AND NATIONALISM* 657 (2010). at 658.

<sup>66</sup> Smooha, *supra* note 64. at 477.

Seeing as the children of intermarried parents are less likely than children of endogamous unions to identify with a single group, “intermarriage decreases the salience of cultural distinctions in future generations<sup>67</sup>”, meaning it is something ethnic democracies would not want to encourage. Yet Estonia and Latvia do not prohibit interethnic marriages<sup>68</sup>. Even if there may be unequal treatment in those ethnic democracies, individuals are still given choice over romantic partners because that is what democratic principles tell them they must do. Meanwhile, Israel is home to legal system that at its formation had already been provided with a historical alternative to civil marriage, an alternative that satisfied their political goals while making it look as if they respected local religious authorities. Through the continued application of the millet system, interfaith marriage, which in this case intersects with interethnic marriage, remains nearly impossible. For the most part, the ethnic groups remain distinct, allowing for control over demographics and the propagation of identity based on exclusion.

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<sup>67</sup> Matthijs Kalmijn, *Intermarriage and Homogamy: Causes, Patterns, Trends*, 24 ANNUAL REVIEW OF SOCIOLOGY 395 (1998). at 396.

<sup>68</sup> Marriage.hiddush.org. n.d. *Freedom of Marriage World Map*. [online] Available at: <<https://marriage.hiddush.org/>> [Accessed 26 August 2020].

### III. Israeli Case Study

Though a lack of civil marriage is nearly universal throughout the Middle East, Israel is the only democracy in the Western world to delegate marriage and divorce solely to the major religious authorities<sup>69</sup>. Committed to the image of a Jewish state, ensuring that Jews retain their majority status has long been a chief political concern, with rhetoric frequently employed regarding high Arab birth rates, bringing with them a demographic threat. While Jews are considered both members of an ethnic group as well as a religious community, the current legal system as it pertains to personal status ensures that difference is based primary on religious rather than ethnic lines. This further helps the majority by erasing the subethnic lines that once divided the global diasporic Jewish population, while simultaneously dividing the previously unified, religiously diverse, Arab population. Continued utilization of remnants of the millet system, i.e., along religious rather than ethnic lines, has been one way in which the state has ensured that the social groups remain insular, seeing as all the major recognized religious communities in the state prohibit interfaith marriage in some capacity. This unification/fragmentation narrative is made even stronger in the state's recognition of only one Jewish denomination, the Orthodox, while Arab citizens can fall under the jurisdiction of either (Sunni) Islamic, Druze, or one of eleven denominations of Christian religious authorities. By unifying the Jews and dividing the Arabs, a system is created in which the disenfranchised groups are too distracted by their internal divisions to focus on the discrepancies between them and their common oppressor.

To be completely transparent, this legal discrepancy could be more simply explained. Looking through a primordialist lens, one could conclude that the different

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<sup>69</sup> Amit Kaplan & Anat Herbst-Debby, *Mixed Ethnicity Marriages and Marital Dissolution in Israel*, 36 JOURNAL OF ISRAELI HISTORY 291 (2017). at 295.

approaches for different communities resulted because identity is inherent. Treating everyone as if they had the same needs can still result in inequalities. There is some merit to this outlook, especially considering that the most devout individuals from these religious communities are often those most supportive of the continuation of Israel's millet-based system<sup>70</sup>. However, it is also quite passive, granting agency to no one and nothing. It negates the fact that humans orchestrate our own political systems, as well as that these political systems, and the societies that create them, evolve over time. Even if religious communities may wish to attribute their ways to divinity, this answer cannot account for systems in which ethnicity is the primary source of division. Israeli family law may be governed by religious institutions, but as this chapter will highlight, religion is not the primary social cleavage. Ethnicity is, yet those in power maintain ethnic hegemony through religious channels.

This paper would be incomplete if it did not, at least briefly, discuss Israel's colonial past. Looking at the state's history, we see that Zionism, the very ideology that led to the state's foundation, is European. Early Zionist leadership was not Israeli; they were European. Once Britain relinquished control of the territory, Jewish leadership had no one left to answer to, allowing them to implement whatever colonial-inspired policies they saw fit. Often referred to as a settler-colonial state<sup>71</sup>, such a label requires "the prior extermination or expulsion of a majority of the indigenous populations, followed by the demographic 'swamping' of these territories by settlers<sup>72</sup>". I will not explore question as to whether or not Israel is guilty of settler colonialism, instead, the preceding quote has been used to underscore the importance of demographics when the end goal is domination over a portion of land, its resources, and its people.

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<sup>70</sup> Evgenia Bystrov, *Religion, Demography and Attitudes Towards Civil Marriage in Israel 1969-2009*, 60 *CURRENT SOCIOLOGY* 751 (2012).

<sup>71</sup> See John Docker, *Instrumentalising the Holocaust: Israel, Settler-Colonialism, Genocide (Creating a Conversation Between Raphael Lemkin and Ilan Pappé)*, 11 *HOLY LAND STUDIES* 1 (2012).; Ilan Pappé, *The Value of Viewing Israel-Palestine Through the Lens of Settler-Colonialism*, 36 *WASHINGTON REPORT ON MIDDLE EAST AFFAIRS* 66 (2017); Nicola Perugini, *The Moral Economy of Settler Colonialism: Israel and the "Evacuation Trauma"*, 4 *HISTORY OF THE PRESENT* 49 (2014).; Elia Zureik, *Settler Colonialism, Neoliberalism and Cyber Surveillance: the Case of Israel*, 29 *MIDDLE EAST CRITIQUE* 219 (2020). and *Infra* Note 68 for an analysis based off of settler colonialism, but arguing that such classification is not quite accurate.

<sup>72</sup> Lorenzo Veracini, *The Other Shift: Settler Colonialism, Israel, and the Occupation*, 42 *JOURNAL OF PALESTINE STUDIES* 26. at 27.

## *A. Demographics*

Due to the nature of Judaism as an ethnoreligion as well as Israel's long-held status as a conflict state, the cleavages of ethnicity and religion are simultaneously cross-cutting and coinciding. The country's ethnic makeup is relatively straightforward with roughly three quarters being Jewish and the remainder being Arab. Religiously speaking, Israel is home to four main religious groups: Jews account for roughly 74.7% of the population, Muslims for 17.7%, Christians for 2%, and Druze for 1.6%<sup>73</sup>. The remaining 4% of the population are "nonaffiliated", meaning that they do not have a religious system of courts to answer to, and until very recently, they essentially could not be married within the state of Israel. While some in this category belong to small religious sects outside the Jewish/Muslim/Christian/Druze classification, the vast majority of those with this non-status are Jews according to Israeli citizenship laws, but not under Judaic religious law.

Within the roughly 75% of the population that is formally recognized as Jewish, both ethnic and religious divides are present that further divide Israeli society in different ways. Though the Ashkenazim, Jews with European roots, founded the Zionist movement and comprised most of early Israeli leadership, the majority of Israeli Jews are Mizrachi<sup>74</sup> who have ethnic ties to the Muslim-majority countries in the Middle East and North Africa. Seeing as Orthodox Judaism is the only recognized denomination within the state,

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<sup>73</sup> Middle East :: Israel — The World Factbook - Central Intelligence Agency, Cia.gov (2018), <https://www.cia.gov/library/publications/the-world-factbook/geos/is.html> (last visited Nov 18, 2019). Naturally, as exact percentages are impossible to pinpoint, different sources include slightly different variations. For example, Sergio DellaPergola, *Ethnoreligious Inter-marriage in Israel: An Exploration of the 2008 Census*, 36 JOURNAL OF ISRAELI HISTORY 149 (2017) lists Jews as comprising 74.8% of the Israeli population. Israel's Religiously Divided Society, Pew Research Center's Religion & Public Life Project (2016), <https://www.pewforum.org/2016/03/08/israels-religiously-divided-society/> (last visited Jan 6, 2020) calculates that figure to be 81%. Such statistical variation is irrelevant here but must be kept in mind throughout this section as a variety of statistics have been compiled from a variety of different sources whose figures may not correlate perfectly when comparing between them.

<sup>74</sup> See Okun & Khait-Marely, *supra* note 55, at 383.

intra-Jewish religious divides are more based upon religiosity rather than denomination. One is considered either secular (*hiloni*), traditional (*masorti*), Orthodox (*dati*), or ultra-Orthodox (*haredi*)<sup>75</sup> with secularists currently comprising the largest faction of Jewish society, followed by traditional, then Orthodox, and finally *haredim* as the smallest segment<sup>76</sup>. This, however, is likely to change in coming years. With an annual population growth rate of 6 – 7%, far exceeding that of any other segment of the country’s population<sup>77</sup>, the ultra-Orthodox is an ever-increasing demographic that is becoming all the more politically relevant.

Despite the country’s secular image, elements of personal status law—exact elements varying from faith to faith—still fall under the jurisdiction of the various religious institutions<sup>78</sup>. Islam is recognized as the second most prevalent religion in the country, with the Druze being a small, protected minority that while enjoying a differentiated status, are often considered Muslim for statistical purposes<sup>79</sup>. Several denominations of Christianity are recognized in Israel in accordance with the Ottoman millet system: Eastern Orthodox, Roman Catholic, Gregorian-Armenian, Armenian Catholic, Syrian Catholic, Chaldean, Greek Catholic Melkite, Maronite, Syrian Orthodox, and Evangelical Episcopal<sup>80</sup>. The Anglican Church as well as the B’hai faith are also recognized as per Mandate-era laws<sup>81</sup>. Like the Rabbinate, the authority for each Christian denomination, as well as the Shari’a and Druze Courts, oversee the marriages of their respective adherents. Naturally, the exact requirements for marriage vary between

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<sup>75</sup> As the United States houses a Jewish population almost the same as Israel’s, I feel the need to translate these terms into their American equivalents as well. The ultra-Orthodox or *haredim* are similar to the Chassidic Jews of the Americas. Orthodox Jewish Israelis comprise more or less the same religious group as Orthodox Jewish Americans. Traditional Jews in Israel would tend to align more closely with the Conservative school of American Judaism, and those considered secular would either be Reform or completely nonpracticing.

<sup>76</sup> Israel’s Religiously Divided Society, Pew Research Center’s Religion & Public Life Project (2016), <https://www.pewforum.org/2016/03/08/israels-religiously-divided-society/> (last visited Jan 6, 2020).

<sup>77</sup> Yohai Hakak, “*Undesirable Relationships*” between Jewish Women and Arab Men: Representation and Discourse in Contemporary Israel, 39 ETHNIC AND RACIAL STUDIES 976 (2016). at 757 – 758.

<sup>78</sup> Zvi Triger, *Freedom from Religion in Israel: Civil Marriages and Cohabitation of Jews Enter the Rabbinical Courts*, 27 ISRAEL STUDIES REVIEW 1–17 (2012). at 3.

<sup>79</sup> Example: Sergio DellaPergola, *Ethnoreligious Inter-marriage in Israel: An Exploration of the 2008 Census*, 36 JOURNAL OF ISRAELI HISTORY 149 (2017). at 153.

<sup>80</sup> United States Department of State, ISRAEL 2018 INTERNATIONAL RELIGIOUS FREEDOM REPORT, 54 (2018). at 5.

<sup>81</sup> *Id.*

the religious authorities, however, the Rabbinate, Shari'a Courts, Druze Courts, as well as the courts of most Christian denominations all have at least some restrictions on interfaith marriage, ensuring that demographics remain relatively straightforward and predictable.

A Jewish state is utilizing a Turkish system, even when it runs directly counter to the democratic principles said state swears to uphold. Surely, the rationale for such policy implementation must be deeper than it was easier to maintain the status quo. While there may have always been Jews in Palestine, they accounted for a small minority, and until the 1880s also local, population, for which there were no major tensions with the Arab majority<sup>82</sup>. The conflict only became ethnic when demographics began to shift. Britain allowed Jewish immigration in droves, far exceeding the quotas seen during Ottoman Rule, propelling Jews from 8% of the Palestinian population in 1918 to 31% in 1942<sup>83</sup>. The indigenous Arab population was then depleted after 700,000 civilians were forced from their homes as a result of the 1948 War<sup>84</sup>. In attempts to saturate the country's demographic makeup even further, the new Jewish elite encouraged immigration of their ethnoreligious kin en masse, making citizenship all but guaranteed if someone could prove Jewish descent<sup>85</sup>. Such outreach measures to diasporic communities continues to this day, still for the sake of trying to amass the largest Jewish population possible.

This has been one of the main objectives of the Israeli government throughout its modern history: to ensure that a Jewish majority is established and maintained. Shortly after formal statehood, Jews comprised almost 90% of the Israeli population, soaring from 8% to 90% in a little over three decades. However, hegemony is still not considered secure, as that percentage has been steadily decreasing since the annexation of Jerusalem in 1967<sup>86</sup>. The demographic threat has thus been a highly contentious political issue since before statehood as changes in the amount of governed territory has had a substantial impact on the ethnic makeup of the country. For decades too, Arab birth rates far outpaced those of Jewish Israelis. According to the Central Bureau of Statistics, such

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<sup>82</sup> Robert Wintemute, *Europe's Last Colony: 1918 Palestine's Arab Majority, Jewish Immigration, and the Justice of Founding Israel Outside of Europe*, 21 SOCIAL & LEGAL STUDIES 121 (2012). at 122.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> The Law of Return 5710 (1950) and The Law of Return (Amendment No. 2) 5730-1970, available online at <https://www.knesset.gov.il/laws/special/eng/return.htm>.

<sup>86</sup> DellaPergola, *supra* note 79, at 149.

trend changed only in 2018, yet with 3.04 and 3.05 births per woman respectively<sup>87</sup>, demographics remain a key area of focus for Jewish leadership<sup>88</sup>.

Due to the demographic threat that has long had to be contended with, the government has had to rely on the immigration—or “return” as they see it—of diasporic Jewish communities lest the Arabs assume a majority. The definition of who is considered a Jew is also a complicated question with a seemingly ever-changing answer. The Mizrachim were only considered to be a vital demographic source after much of the Ashkenazi population was exterminated. Specifics surrounding their historical status will be explained later. Immediately after the War of 1948 saw formal Israeli statehood, Jewish residents of Islamic countries were forced out quickly, meaning that the state could only rely on them for a short-term influx of emigration rather than a long-term demographic source. Once demographic reserves from the Middle East and North Africa were depleted, Jews from the Former Soviet Union served as the next wave of immigration to Israel. This created a new issue in Israeli demography and negotiation of personal status law as it caused a huge influx in the country’s non-affiliated population. An ethnoreligion, people can technically convert to Judaism, but the process is notoriously difficult, not encouraged by the state, and not common, likely due in part to the deep ethnic divisions present within Israeli society. The annual number of conversions to Judaism between 1998 and 2014 were roughly equal to the annual number of non-affiliated individuals born<sup>89</sup>, making conversion unreliable in maintaining majority status.

### ***B. Legal Approach to Marriage***

The delegation of marriage to the individual religious organs may look like a compromise on two different fronts: one regarding intra-Jewish debates over religiosity of the state

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<sup>87</sup> Aderet, Ofer, *For the First Time in Israel's History, Jewish Fertility Rate Surpasses That of Arabs*, Haaretz, Dec 31, 2019, <https://www.haaretz.com/israel-news/.premium-in-first-for-israel-jewish-fertility-rate-surpasses-that-of-arabs-1.8343039> (last visited Jan 9, 2020).

<sup>88</sup> This is not just regarding the fear of eventually dwindling into a minority population. Immediate concerns focus mostly on elections. The larger the Arab population, the harder it is for right-wing leadership to stay in power. See Smooha, *supra* note 64, at 487.

<sup>89</sup> DellaPergola *supra* note 79, at 163.



and the other pertaining to the treatment of minorities. Looking at the first compromise, religious jurisdiction over set elements of personal status provided a line between the religious and the secular. The prominence of religious tenets in civil law is highly contested in any society in which a politically relevant portion of the population is deeply religious, with the debates likely being even louder when said religion is an ethnoreligion in the context of a conflict zone. This is even further complicated due to the state's commitment of being both "Jewish" and "democratic", an interesting paradox considering the former is a religion and the latter implying adherence to liberal—read secular—principles. Such a negotiation of the two is quite difficult, and as highlighted throughout this piece, seemingly never successful in appeasing all factions of society, or even, all factions of Jewish society. As legitimacy in this context relies upon an ethnoreligious claim, policies that draw distinctions between Jewish as an ethnic group and Judaism as a religion must be very careful in alienating just the right amount of people in the right way to ensure continued public support.

Upon the collapse of the Ottoman Empire and British takeover of Palestine, the Mandate Period upheld the millet system as essentially a consolation prize for Muslim Palestinians. Having been the official courts during Turkish rule, once the British took control of the region, Muslims, long the majority, for the first time found themselves just another community to which control was delegated. They went from the hegemon to a subordinate class quite rapidly. A Christian state promising land to Jewish leadership, Britain was well aware of this sharp decline in the status of Muslims in the area and their courts, and as such formalized the Islamic religious authority<sup>90</sup> despite supporting the implementation of a Jewish government. This was the foundation for the Christian, and eventually Druze, courts to be both fragmented and official—at least in practicality—organs of the state, thus solidifying the neo-millet approach into post- (or neo-) colonial history. Immediately prior to statehood when British influence was waning, David Ben-Gurion conceded some elements of the state to Orthodox religious authorities in a letter that became known as the status quo agreement. Included within religious jurisdiction

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<sup>90</sup> Michael Karayanni, *Tainted Liberalism: Israel's Palestinian-Arab Millet*, 23 *CONSTELLATIONS* 72 (2016). at 75.

was the continued oversight of marriage and divorce for Jewish citizens<sup>91</sup>. Just like the Ottomans, Israel too implemented the millet system in the territory they ruled out of perceived necessity, with the precise need being very similar despite being enacted by different majority religions. Whereas the Ottomans had to contend with plurality over vast territory, Israel had to win allegiance to a small geographic space but by a people spread throughout the globe.

The ever-increasing demographic and political relevance of the ultra-Orthodox population comes with increased demands for adherence to religious law. At the time the millet system became codified into modern Israeli law, however, the Orthodox were not by themselves politically significant enough to play such a role in deciding state policies<sup>92</sup>. In order for the courts to gain original jurisdiction, secular leadership could not have been too opposed to religion playing a role in the civil state. Reflecting back to the idea of neo-primordialism, we see early post-1948 leadership utilizing both ethnicity and religion to further a nationalistic project as a means of satisfying two ideological objectives of the new state. According to Sezgin, both the homogenization of formerly diasporic populations as well as the creation of division within the political “other” could be accomplished through the institutionalization of religion<sup>93</sup>. Seeing as the immigrant communities to the new state came from different countries of origin, spoke different languages, and often had different religious practices, by unifying them all under one branch of Judaism, the state provided a strong commonality that had previously been weak, helping to solidify the “us versus them”. While certainly social perceptions of these intra-Jewish divisions remained, no longer was there a formal Mizrachi versus Ashkenazi or secular versus Orthodox divide. Instead, all Jews were considered simply “Jewish”, so long as they were considered so under *halacha*, Orthodox religious law.

With this unification of the group which the state was most concerned with overseeing too came the dividing of populations who did not fall under this pan-Jewish umbrella. The Jews and the Arabs of what would become modern Israel comprised

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<sup>91</sup> Hanna Lerner, *Entrenching the Status-Quo: Religion and State in Israel's Constitutional Proposals*, 16 CONSTELLATIONS 445 (2009). at 447.

<sup>92</sup> Yuksel Sezgin, *The Israeli Millet System: Examining Legal Pluralism through the Lenses of Nation-Building and Human Rights*, 43 ISRAELI LAW REVIEW 631 (2010). at 638.

<sup>93</sup> YUKSEL SEZGIN, HUMAN RIGHTS UNDER STATE-ENFORCED RELIGIOUS FAMILY LAWS IN ISRAEL, EGYPT, AND INDIA (2013). at 95.

inverse cleavages. While the former shared a common religion (even if exact beliefs varied) and multiple ethnic identities, the latter was a single ethnic and national, but multi-religious group. In having identity for members of the new state revolve around religious lines, unification of the majority and continuation of said majority was achieved through the very process that divided the minority. Arabic speaking, the Druze are more friendly with the Jewish establishment than other minorities, often even choosing to serve in the Israeli Defense Forces despite being exempt from the country's mandatory military conscription<sup>94</sup>. As such, the granting of their religious authorities formal jurisdiction, which had not been done under either British or Ottoman rule, was a means of making the social hierarchy more explicit in the removal of the most well integrated faction of Arab society from the default Arab, presumed Muslim, population pool. The favoring of a very small percentage of "othered" members of Israeli society thus served to push the Muslim population even lower in the social hierarchy. Unlike the other three religions, Christian courts, while maintaining similar jurisdiction over matters of personal status, are the only religious legal institutions to have never been overseen by the Ministry of Justice or Ministry of Religious Affairs<sup>95</sup>. The formalization of all the various sects was unnecessary, seeing as the relatively small Christian population is already divided between denominations. Continuation of a millet-based system ensured that this social division was self-perpetuating. Just as it is prohibited for Jews to marry non-Jews, respective religious authorities for Christians and Druze too have laws against exogamy. While Muslim men can technically marry Christian and Jewish women, this practice is socially discouraged, and the insular nature of those other religious groups makes cases of such rare, thereby preventing any unity between the various Arab religious factions that could possibly threaten the state.

According to Karayanni, granting authority over personal status law to what would become minority religious groups was also a means of legitimizing the formation of the new state in the eyes of the international community<sup>96</sup>. Given the multi-religious makeup of Israel, Balfour and the subsequent policies of the Mandate period and early

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<sup>94</sup> The Law Library of Congress, ISRAEL: MILITARY DRAFT LAW AND ENFORCEMENT, (2020), <https://www.loc.gov/law/help/military-draft/israel.php> (last visited Sep 5, 2020).

<sup>95</sup> Sezgin, *Human Rights*, *supra* note 93.

<sup>96</sup> Karayanni, *supra* note 90, at 74 – 75.

statehood were very careful in maximizing promises of religious tolerance. This brings us to another negotiation that the state has had to navigate: liberalism in a system that is inherently coercive. A private matter, individual religious beliefs/practices suddenly become public concern when laws are different for members of different faiths. Explicitly favoring “the establishment in Palestine a home for the Jewish people”, the 1917 Balfour Declaration also stated, “that nothing shall be done which may prejudice the civil and religious rights of the existing non-Jewish communities”. Similarly, the 1922 Mandate for Palestine pledged to uphold respect for “the personal status of the various peoples and communities” in the region, with the 1948 Declaration of Independence echoing the same rhetoric<sup>97</sup>. The language, in a way both representative of a millet-like system and a means of securing its continuation, does not, notably, refer to the rights of *individuals* from non-Jewish communities, rather to the rights of the *communities* as singular entities. While Jews are too coerced into abiding by a communitarian approach to personal status law, the Rabbinical Court only has jurisdiction over marriage and divorce, whereas Christian and Muslim courts enjoy a more expansive jurisdiction, including over elements of personal status such as custody agreements<sup>98</sup> and inheritance<sup>99</sup>. Whereas an individual Jew can choose not to marry—more on the trend to forego marriage entirely later on—and hence remove him or herself from the scope of the Rabbinical Authority, a Muslim cannot choose, for example, not to have a family member die and thus avoid being subjected to the jurisdiction of the Shari’a courts. Rights, according to the current Israeli structure, are thus group rights, with little space reserved for those who do not wish to adhere to the religious law prescribed to them. As such, nonbelievers, want-to-be-converts, and general secularists are forced into abiding by theocratic principles instead of the democratic ones the state claims to be interested in upholding.

The jurisdiction of the Rabbinate increased following formal statehood, but has been slowly chipped away at by the civil courts to varying degrees of success. Contrary to the pure millet system, reforms made during the Mandate Period required that Jewish

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<sup>97</sup> *Id.*

<sup>98</sup> Ido Shahar, *When “Mixed” Marriages Fall Apart: A Sociolegal Perspective*, 36 JOURNAL OF ISRAELI HISTORY 313 (2017).

<sup>99</sup> Karayanni, *supra* note 90.

individuals register with the religious authorities in order to have access to the Rabbinical Courts. Therefore, if someone did not want their lives overseen by the Rabbinate, they could choose simply not to register themselves and therefore be subjected only to civil law<sup>100</sup>. While the Rabbinical authority did have a say over a wider variety of issues that fell under the personal status umbrella, at least Jews had a choice as to which law, religious or civil, they followed. This choice was taken away with the passage of the Rabbinical Courts Jurisdiction Law of 1953, which while limiting the jurisdiction of the Rabbinical courts solely to matters of marriage and divorce rather than to all elements of personal status law also made such jurisdiction mandatory. Soon after in 1955, the Dayanim Law was adopted which made Rabbinical judges (called *danayim*) state officials equal in position to that of civil judges<sup>101</sup>. Civil legislation was enacted granting official authority to a body other than the state, in a way subcontracting out the state's jurisdiction while placing the subcontracted party on a level equal to that of the contracting state itself. Whereas religion is private to the individual, and whereas Israel has supposedly promised to recognize the freedom of religion, seeing as everyone must be under some religious authority, the state does not recognize the right of someone to *not* be religious at all. In having no alternative for recognized family formation, the state successfully places religion in the public realm without blatantly prioritizing one religion over another.

Since the 1953 reforms, little has changed regarding the structure of marriage within Israel, at least for the country's Jewish majority. Over time, with Jewish migration came, much to Israeli leadership's dismay, non-Jewish migration as well, which further complicated the country's fragile demographic makeup. Most of the non-affiliated are ethnically Jewish per Israel's Law of Return which recognizes anyone as "Jewish enough" for citizenship provided he or she has at least one Jewish grandparent or has converted to Judaism. A discrepancy is created in that once citizenship is obtained, the individual must qualify as Jewish under Orthodox law in order to be religiously considered a Jew, with *halacha* requiring an individual have a Jewish mother in order to be recognized as a member of the faith without the need to undergo an Orthodox

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<sup>100</sup> Sezgin, *The Israeli Millet*, *supra* note 92, at 80.

<sup>101</sup> *Id.*

conversion. In certain diasporic communities, such as those in the former Soviet Union, marriages between Jews and non-Jews was/is fairly common, and upon the wave of Soviet Jewish emigration to Israel in the 1990s, hundreds of thousands found themselves outsiders in the very state that was supposed to finally provide them with a sense of community. This “othering” happened to those who did meet the requirements to be considered a member of the Jewish faith but who came from countries/regions in which records sufficient to prove descent simply were not kept, a large number of non-Jews who immigrated with their Jewish family members<sup>102</sup>, as well thousands of patrilineal Jews who were not “Jewish enough” for the Rabbinate. Considering that different societies have different perceptions of ethnicity and race, many of these individuals not only considered themselves Jewish, but were also considered Jewish by those around them in their country of origin, thus creating a split identity upon their arrival to Israel. As the rules of *halacha* are what governs marriage, these ethnic Jews are unable to marry anyone who is Jewish according to the religious definition, i.e., the majority of the population, regardless of the partners’ individual degree of religiosity. This Jew-“ish” status is then passed on to future generations, as its status, like that of Judaism, passes through the maternal line.

In response to the gap created by this demographic shift, Israel adopted the Civil Union Law for Citizens with No Religious Affiliation in 2010, which gives couples the option to enter into a civilly governed partnership provided both members are considered non-affiliated. Despite the titular phrase being “civil union”, a phrase used in the West typically to refer to recognized unions similar to but with fewer benefits than for same-sex couples, the definition of “couple” as per Section 1 of the 2010 law ensures that only heterosexual, non-affiliated couples are eligible for civil marriage. Couples in which one partner meets the criteria to belong to a recognized religious group are still ineligible for any formalization of their relationship. This too is in line with the state’s policy following the 2006 *Noahides* case, which after decades of silence regarding the validity of civil marriages performed abroad decided to recognize these unions provided that the couple

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<sup>102</sup> DellaPergola, *supra* note 79, at 151.

was eligible to marry in Israel<sup>103</sup>. Though the *Noahides* decision contained the caveat that the couple must be able to marry in Israel for their marriage to be recognized, it nonetheless set the foundation for quick legal reforms, perhaps as an attempt by the civil courts to take back the power long delegated to the religious authorities. Within that same year, the Israeli Population Registry was counting members of these otherwise illegitimate unions as formally married<sup>104</sup>. This consideration has created the legal precedent of formal recognition for all couples married overseas, whether they be legally eligible to marry in Israel or not. Due both to the high proportion of the non-affiliated, as well as a vocal opposition to the coercive nature of the Rabbinate, in 2010, roughly 16% of Israeli couples wed in civil ceremonies abroad, with that number appearing to only be on the rise<sup>105</sup>, even amongst couples who could marry legally within the state.

In recent decades, the civil courts have been trying to reformat a hierarchy of legal authority in which civil law supersedes religious law. This has been seen both with regard to the Rabbinical and Shari'a Courts. For everyday court proceedings, there is a hierarchy through which the religious courts must respond. After being heard by the lower religious court, each religion has a court of appeals. After the appellate decision, parties can petition review by the Israeli Supreme Court, even in cases that would normally fall under religious jurisdiction. While the Supreme Court is often careful in their decisions to maintain the delicate balance between the state and the religious establishments, the civil system can still have a say in matters otherwise delegated under the personal status umbrella. For example, the state has criminalized both polygamy and marriage to a girl below a certain age since prior to formal statehood, even though it conflicts with the beliefs of several religions who hold jurisdiction over marriage. While the secular state has the power to punish the act of polygamy as criminal law falls outside

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<sup>103</sup> Ayelet Blecher-Prigat, *A Basic Right to Marry: Israeli Style*, 47 ISRAEL LAW REVIEW 433–460 (2014), at 441.

<sup>104</sup> *Id.* at 448 – 449.

<sup>105</sup> According to various sources, this figure stood at anywhere between 9.6 – 12% in 2004 – 2006 (*Source: Zvi Triger, Freedom from Religion in Israel: Civil Marriages and Cohabitation of Jews Enter the Rabbinical Courts*, 27 ISRAEL STUDIES REVIEW 1–17 (2012).), 16% in 2010 (*Source: Rabbi Uri Regev, Why Is It so Difficult for Jews to Marry in Israel?* Hiddush.org (2013), [http://hiddush.org/article-2454-0-Huffington\\_Post\\_Oped\\_Why\\_Is\\_It\\_so\\_Difficult\\_for\\_Jews\\_to\\_Marry\\_in\\_Israel.aspx](http://hiddush.org/article-2454-0-Huffington_Post_Oped_Why_Is_It_so_Difficult_for_Jews_to_Marry_in_Israel.aspx) (last visited Mar 9, 2020)).

the scope of the religious courts, it does not have the power to render polygamous marriages void, since determining the validity of a marriage would be an infringement upon religious jurisdiction. Interestingly, however, either because of Judaic hegemony or the impending “demographic threat”, an already married Jewish man can obtain special permission from the Rabbinate to take another wife without fear of conviction<sup>106</sup>, whereas a married Muslim man does not have the option to obtain special permission from the Shari’a Courts<sup>107</sup>, despite polygamy being perfectly legal under Islamic law.

Seeing as the courts cannot extend civil marriage to all couples—such a policy could only be enacted by the legislature who is constrained by the need to cater to religious parties—they instead have begun taking an alternative route in the extending of rights previously associated with marriage to non-married couples. Lacking a constitution, Israel’s supreme law lies in a collection of pieces of legislation known as Basic Laws, which can be adopted by the Knesset whenever it deems necessary. One such example of these laws was the 1992 Basic Law: Human Dignity and Liberty, wherein Article 7(a) states “all persons have the right to privacy and to intimacy<sup>108</sup>”. Notice that this article gives no explicit reference to marriage, which is exactly why it is notable. If the legislature wished solely to confine its constituents to the religious system, the language provided would have been contingent upon the religious legitimizing of intimacy, i.e. marriage. The fact that more secular language was employed was a means of granting at least some recognition to informal unions, at least in the eyes of the courts. While the courts have occasionally used this article to refer specifically to formal marriage, such is rare, with most pertinent judicial opinions viewing it as a means to extend the legal rights and duties of marriage to non-married, cohabitating couples<sup>109</sup>.

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<sup>106</sup> Note: As is typical when dealing with the Abrahamic religions, polygamy here refers to a man taking more than one wife. The thought of a woman taking more than one husband is never much entertained in legal discussions. Thank you, Patriarchy.

<sup>107</sup> Amihai Radzyner, *Rabbis Drafting Criminal Legislation: The Shaping of the Prohibition against Bigamy in Mandatory Palestine*, 66 AMERICAN JOURNAL OF COMPARATIVE LAW 369 (2018). at 370.

<sup>108</sup> For the formal translation from the Israeli Knesset, see Basic Law: Human Dignity and Liberty, KNESSET.GOV.IL, [https://www.knesset.gov.il/laws/special/eng/basic3\\_eng.htm](https://www.knesset.gov.il/laws/special/eng/basic3_eng.htm) (last visited Feb 24, 2020).

<sup>109</sup> Blecher-Prigat, *supra* note 103, at 434.



Noting their constraint, in recent decades, the non-religious courts have focused more upon the idea of reputed spouse, or *yedu'im be-tzibur*. Since 1965, Israel has recognized the right of reputed spouses to inherit just as a spouse would through the adoption of Section 55 of the Law of Succession. In 2006, immediately following the *Noahides* decision, this right to inherit was expanded through the *Inheritance* Case, for the first time not focusing on the common-law aspect of the couple's informal union, but in recognizing the surviving party's right to inherit as a "married" person<sup>110</sup>. The couple in question was interestingly an interfaith one, with the surviving "wife" having been a Christian cohabitating with a Jewish man. Furthermore, after decades of battling in the legal arena regarding the ability for non-married couples to bare the same last name, the Names Law was finally amended in 1992 after the Supreme Court ruled that "their relationship as unmarried cohabitants cannot serve as a basis for denying them the right to change their name"<sup>111</sup>. At the same time, however, reputed spouses still do not enjoy privileges pertaining to trial proceedings, avoidance of military conscription, or the very real but hard to quantify symbolic standing that comes with a formal marriage<sup>112</sup>.

This attempt by the Civil Courts to diminish religious oversight pertaining to formal relationships, however, has not come without response from the Rabbinate. In addition to the 2006—clearly a busy year for legal questions pertaining to marriage—ruling that civil marriages conducted abroad were valid, the Supreme Court also ruled that "the rabbinical court system had jurisdiction over the divorce of couples who had married in civil ceremonies...however, that such a divorce should be performed in a shorter procedure than a religious divorce<sup>113</sup>," considering that a religious divorce is notoriously difficult to obtain as well as heavily biased against women. However, this decision has largely been ignored and full religious divorce procedures have often been carried out even for couples who did not marry under Rabbinical Law<sup>114</sup>. In many of the cases in which Rabbinical Courts have followed the 2006 decision, they have also tried to expand their jurisdiction over the dissolution of the marriage into areas over which they

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<sup>110</sup> *Id.* at 441 – 442.

<sup>111</sup> *Id.* at 444.

<sup>112</sup> *Id.* at 445.

<sup>113</sup> Triger, *supra* note 78, at 6.

<sup>114</sup> *Id.* at 1 – 2.

have not held authority since prior to the reforms of the 1950s, such as alimony payments and division of property<sup>115</sup>. Reacting to the apparent caveat that the legislature and civil courts have created in the recognition of *yedu'im be-tzibur*, the Rabbinical Courts have too tried to force Jewish law upon the dissolution of reputed spousal relations, meaning a divorce for people who have never been officially married<sup>116</sup>. In short, the Rabbinate has refused to recognize the decision of the civil court, essentially rendering futile the latter court's attempt to seize back power.

But say the Rabbinical authorities simply chose not to interfere in couples who have not gone through the religious marriage proceedings. Blecher-Prigat believes this to be a feasible solution<sup>117</sup>, as, if the rights were same, couples unable to marry would still have a channel of relationship recognition. Marriage in all but name. Does this sound familiar? Civil unions and the like were inferior structures designed to serve the political need of placation. Noting that the ways in which marriage have historically been utilized by governments as a means of controlling populations, it may seem odd at how open the institution has become. Once birth rates declined and civil rights became more relevant in more traditionally liberal democracies, controlling the future demographics of the population became less blatant of a concern to lawmakers. At current, it appears to be regulating itself according to acceptable standards, meaning that additional government regulation is not necessary in achieving ultimate objectives. The same is not true in Israel, where Jewish leadership sees equal birth rates for Jews and Arabs as a threat to the Jewish collective, even if these rates are still sufficient for Jews to maintain majority status. This is likely the reason that common-law unions have yet to be recognized for interfaith couples<sup>118</sup>. Reputed spouses and recognition of marriages abroad, even for non-heterosexual couples<sup>119</sup>, may indicate that the institution of marriage is slowly becoming less restricted to Israelis, but that does not mean that the state no longer feels the need to keep the ethnic/religious factions separate from one another.

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<sup>115</sup> *Id.* at 7 – 8.

<sup>116</sup> *Id.* at 9 – 10.

<sup>117</sup> See Blecher-Prigat, *supra* note 103.

<sup>118</sup> Triger, *supra* note 78, at 9.

<sup>119</sup> Blecher-Prigat, *supra* note 103, at 448.

An ethnic democracy holding onto the millet system is a prime example of family law exceptionalism, as it is through the national approach to family law that the ruling ethnic group maintains its hegemony. Ethnic democracies are inherently neo-primordialist, as their policies, which run directly counter to the principles the state claims to uphold, are made in response to a perceived democratic threat. It is no wonder then that Israel served as the basis for Smooha's ethnic democratic model, whose features include:

“an ideology or a movement of ethnic nationalism that declares a certain population as an ethnic nation sharing a common descent (blood ties), a common language and a common culture. This ethnic nation claims ownership of a certain territory that it considers its exclusive homeland....the ethnic nation, not the citizenry, shapes the symbols, laws and policies of the state for the benefit of the majority. This ideology makes a crucial distinction between members and non-members of the ethnic nation. Members of the ethnic nation may be divided into persons living in the homeland and persons living in the diaspora....Citizenship is separate from nationality....[sic new paragraph] Non-members of the ethnic nation are not only regarded as less desirable but are also perceived as a serious threat to the survival and integrity of the ethnic nation<sup>120</sup>.”

Proponents of the state of Israel see it as a Jewish homeland. In order for a specific group of people to have a homeland, specifically in which diasporic populations are actively encouraged to move to that homeland<sup>121</sup>, there must be something believed to be intrinsic about that group of people entitling them to that land, at least in their own collective conscious. Other authors writing on Israel's divided social structure and the demographic threat tend to lean more towards the instrumentalism camp of theories of social identity<sup>122</sup>. While this is accurate, I feel it is not entirely comprehensive as such a stance takes the homeland narrative for granted. For Zionist Jews, Israel is not just a place for Jews to live, it is an essential part of the Jewish identity itself, a part of the identity that is perceived to be under attack, constantly threatened, to such a substantial degree that the entire collective is at risk. Accounting for this self-perception in the collective conscious is necessary to understand just how truly instrumental the country's policies are in maintaining segregation, and thus protecting the Jewish collective from the Arab threat.

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<sup>120</sup> Smooha, *supra* note 64, at 477 – 478.

<sup>121</sup> See Leonard Saxe et al., *Intermarriage: The Impact and Lessons of Taglit-Birthright Israel*, 31 CONTEMPORARY JEWRY 151 (2011).

<sup>122</sup> Blecher-Prigat, *supra* note 103.; Sezgin, *Human Rights*, *supra* note 93.; and Triger, *supra* note 78

But a key part of being an ethnic democracy is too, aside from the disparity between social groups, having democratic institutions. This is where family law exceptionalism comes into play. Israel is democratic enough to be considered an ethnic *democracy*. Democratic institutions are present, with regular free and fair parliamentary elections, a judiciary to check the power of parliament, and journalist freedoms<sup>123</sup>. Arab citizens of Israel enjoy full democratic rights equal to those of Jewish citizens<sup>124</sup>. However, the groups cannot intermarry as a result of the country's millet-like approach to personal status law. Through family law, the law regulating marriage, segregation, a non-democratic principle, is enforced. Social stigma that both results from and is compounded by this forced segregation in turn creates more segregation, only to ultimately create more social stigma. Family law is the exception to Israel's democracy. Whether that is the result of historical happenstance—the empire which invented the millet system just happened to take over a very historically relevant piece of land—is beyond the point. Delegating marriage to the jurisdiction of the religious authorities was not a decision made out of convenience, but a means of crafting the Jewish state Zionist leaders set out to establish.

### ***C. Old Intermarriage: The Redefining of Ethnic Ties***

The fragmentation of Israel's newfound "others" was not enough in consolidating a single Jewish identity. With the unification of religion came an even more intense focus on, and on eroding, subethnic divisions within the Jewish immigrant population to the new state. Seeing as Judaism has long mandated religious insularity, and that on a religious level, the country of origin is not pertinent when deciding an individual's Jewishness, the granting of authority to an Orthodox Rabbinate was also a means of unifying Jewish citizens across ethnic lines. Given historical racial tensions between Jewish populations from different parts of the world, "intermarriage" within the Israeli context has predominantly been used to refer to couples in which one partner was

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<sup>123</sup> Dov Waxman & Ilan Peleg, *The Nation-State Law and the Weakening of Israeli Democracy*, 25 ISRAEL STUDIES 185 (2020). at 191.

<sup>124</sup> *Id.*

Ashkenazi, of European origins, or Mizrachi, literally meaning “Eastern” but typically connotating non-white Jewry, particularly from the Islamic World. This remains the dominant definition in literature as late as 2020, despite known cases of Jewish-Arab marriage, a fact that in itself says a great deal about the way in which these relationships are viewed within Israeli society. The issues surrounding and evolution of interethnic mixed-Jewish marriage is thus a necessary foundation to explore interfaith Jewish/non-Jewish unions.

The early Zionist movement was dominated by the Ashkenazi, who had little regard—or even downright contempt—for non-European Jewry. This was the result of blatant racism<sup>125</sup>, yes, but the demonization of other social groups is usually done with an objective. When Zionism was in its fledgling stages, Britain controlled Palestine, and as such, the leadership had to garner support of an even more blatant colonial power. Cloaking themselves as fellow colonizers<sup>126</sup>, those who wished to “civilize” a “barbaric” region, was likely a political strategy, just like their current guise of being a persecuted people in need of protection. As Jews from Europe began to settle in Palestine, discussion on the integration of Eastern diasporic populations did not first occur until 1907. When talks finally began, they were within the context of establishing a labor force in Israel that did not require reliance on Arab populations, a policy that ultimately stirred up further contempt for non-Ashkenazi Jews<sup>127</sup>. With the Holocaust and the extermination of half of the Ashkenazi population, however, attitudes began to change as it became clear that Europe would prove an insufficient source for the new Israeli population<sup>128</sup>. Immediately following recognition of statehood, efforts to recruit Jewish immigrants from multiple diasporic communities were well under way, but those from Eastern communities, though now needed by the state, were still treated as second class. Mizrachi immigrants were forced into “transit camps”, little more than makeshift, refugee-style housing, upon their arrival to Israel. Once the camps had reached capacity, Mizrachi, primarily North African

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<sup>125</sup> Ehud Ein-Gil & Moshe Machover, *Zionism and Oriental Jews: A Dialectic of Exploitation and Co-optation*, 50 RACE & CLASS 62 (2008). at 63.

<sup>126</sup> Joseph Massad, *Zionism's Internal Others: Israel and the Oriental Jews*, 25(4) JOURNAL OF PALESTINE STUDIES 53 (1996). at 55.

<sup>127</sup> Yosef Gorny, *The “Melting Pot” in Zionist Thought*, 6 ISRAEL STUDIES 54 (2001). at 58.

<sup>128</sup> Massad, *supra* note 126.

immigrants of the 1950s, were sent to live in desert villages immediately upon their arrival to the country, as the state could not drum up enough volunteers from other populations for their quest to cultivate rural land<sup>129</sup>. Ashkenazim new to the country, however, were “given homes of the displaced Palestinian population”<sup>130</sup> typically in areas of the country that were in the highest demand amongst newcomers.

As the Mizrachim filled the role of the social “others” and comprised a lower rung of the social ladder within Israeli society, marriages between Ashkenazi and Mizrachi Jews, though religiously permitted, were highly frowned upon by many of the new state’s citizenry<sup>131</sup>. This changed rapidly following formal statehood, with “mixed” marriages of this nature doubling from 10% of all Jewish marriages in 1950 to 20% in 1980<sup>132</sup>. Leadership now saw internal division this as a national threat, and thus took measures to erode the social rifts that existed between Ashkenazi and Mizrachi Israelis. Legitimized and facing a much graver demographic threat than intra-Jewish mixing, leaders such as David Ben Gurion and Menachem Begin, despite being political opponents, both encouraged the abandonment of subethnic ties as a means of creating a single unified Jewish identity. This so-called melting pot policy for Israel’s Jewish citizens had three facets: a uniform, national education system, mandatory military service, and intermarriage<sup>133</sup>.

Though intended to be unifying policies, the mission to establish a single, pan-Jewish “Sabra”<sup>134</sup> identity was too built upon politics of exclusion, serving merely to broaden the categories of “us versus them” rather than erode such notions. Upon the formal recognition of a Jewish state came the need to uphold the collective identity as such, meaning that demographics became an area of much contention. Like identity formation in late Medieval Europe, establishing a single Jewish culture was necessary to solidify legitimacy of the state, especially in Israel’s case given the controversial nature

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<sup>129</sup> Avi Picard, *The Reluctant Soldiers of Israel’s Settlement Project: The Ship to Village Plan in the mid-1950s*, 49 MIDDLE EASTERN STUDIES 29 (2013). at 33.

<sup>130</sup> Massad, *supra* note 126. at 58.

<sup>131</sup> See the reactions of interviewees’ grandparents to news of their children’s mixed marriages in Talia Sagiv & Gad Yair, *The End of Ethnicity? Racism and Ambivalence Among Offspring of Mixed Marriages in Israel*, JOURNAL OF ETHNIC AND MIGRATION STUDIES (2019).

<sup>132</sup> *Id.* at 5.

<sup>133</sup> *Id.* at 3.

<sup>134</sup> See *Id.* at 13, Footnote 2.

of its statehood within both its own territory and the international sphere. Unification, the merging of communities from different corners of the world, who practiced their religion differently and spoke different native languages, needed to be based against someone else. Someone had to assume the role of the “other” which was slowly being removed from the Mizrachim. Naturally, this role was filled by Israel’s non-Jewish citizens, particularly the Arab Muslims who as the only sizable minority also made up the primary political threat. Sagiv and Yair highlight three key channels through which the state sought to unify Jews of different ethnic backgrounds:

*Education* – Despite Eastern Jews being part of the melting pot policy, stereotypes and sentiments of Mizrachi inferiority permeated into the Israeli educational system. The state’s *tipuach* programs of the 1970s implemented in public schools throughout the country have been described as “rehabilitation program[s] for the ‘culturally challenged/mentally impaired”<sup>135</sup>. Using the father’s country of origin as a factor in determining a student’s level of “need”, these cultural reeducation programs overwhelmingly targeted the children of the “uneducated”, “primitive” Mizrachi immigrants. Essentially methods of reeducation, these programs were to ensure that Mizrachi children, whose families often came from the Middle East or North Africa, spoke Arabic as a native language, and may have been fairly well-integrated into Arab society, better aligned with the “more Jewish” Ashkenazi-inspired culture.

*Military Service* – The idea of military service as a means of enforcing national identity is not shocking, giving the price servicemembers must often pay for what is seen as the collective good. However, the crafting of identity via the Israeli Defense Force is unique in that it was deliberately intended to serve as part of the state’s attempt at Jewish unification. In the formation of a single national identity, military service was also another channel for cultural integration/reeducation, with Mizrachi Jews “expected to undergo a process of ‘desocialization’ whereby they were to shed their cultural customs”, replacing them with an Ashkenazi system of values<sup>136</sup>. While ethnic divisions and stereotyping still exists between Ashkenazi and Mizrachi members of the military<sup>137</sup>, mandatory military

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<sup>135</sup> Nissim Mizrachi, *From Badness to Sickness: The Role of the Ethnopsychology in Shaping Ethnic Hierarchies in Israel*, 10 *SOCIAL IDENTITIES* 219 (2004). at 225.

<sup>136</sup> Dana Kachtan, *The Construction of Ethnic Identity in the Military—From the Bottom Up*, 17 *ISRAEL STUDIES* 150 (2012). at 153.

<sup>137</sup> *See Id.*

conscription has helped to warp perception of the enemy enough to make the overall policy of pan-Jewish integration a success.

*Intermarriage*—Once socially frowned upon due to the perceived inferiority of the Mizrachim, “mixed” intra-Jewish marriages are now relatively normalized in Israel society, likely due in part to the state’s efforts in encouraging this merge in identity. Whereas intermarriage may eventually contribute to an even sharper disparity between what is left of the old ethnic factions, at the individual level, there is a trend of upward mobility. The children of Ashkenazi-Mizrachi marriages have always been situated in between the two in terms of educational and economic level, and over time, these levels are steadily moving closer towards the affluency enjoyed by the Ashkenazim<sup>138</sup>.

Facing disproportionate rates of poverty<sup>139</sup> and the victims of racial stereotypes, despite the efforts made by the state during the mid-20<sup>th</sup> century, disparities still exist between Ashkenazi and Mizrachi Jews in Israel. With this in mind, however, their situation began to improve only after another social class became even lower on the social ladder than them. State efforts to create a melting pot policy appear largely to have succeeded. In 1995, only 5.3% of those between the ages of 40 – 43 were multiethnic, but with this figure increases substantially when examining younger and younger age groups, reaching a quarter of the population (25.1%) of those between ages of 10 – 11 in that same year<sup>140</sup>. As this generation is now of age to have their own children, the current rate of multiethnic identification amongst Israeli Jews is likely even higher. Similar to the perceptions that are still prominent in their country, the children of these Ashkenazi-Mizrachi relationships still adhere to ethnic biases and racist sentiments<sup>141</sup>, yet simultaneously see themselves as “the ultimate Israelis” proving that “societies can erase racism and obliterate ethnic hatreds”<sup>142</sup>. This seemingly paradoxical relationship with identity—or identities, depending on how one looks at it—makes sense as they are in a transitional phase of societal ethnic dynamics. The respondents to Sagiv and Yair’s study

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<sup>138</sup> Kaplan & Herbst-Debby, *supra* note 69, at 294.

<sup>139</sup> *Id.*

<sup>140</sup> Okun & Khait-Marely, *supra* note 55, at 381.

<sup>141</sup> Sagiv & Yair, *supra* note 131, at 2.

<sup>142</sup> *Id.* at 8 – 9.



who harbor such mixed feelings are the third generation of “Sabra” Israelis. Considering that it takes four generations of mixedness for original ethnic values to be erased<sup>143</sup>, only time will tell exactly how this growing segment of Israel’s population negotiates the multiple sides to their ethnic identity.

An earlier piece by Sagiv using seemingly the same pool of interviewees repeatedly highlights how the children of mixed unions rely on personal experiences to disprove stereotypes of the two ethnicities<sup>144</sup>. Given the fact that more affluent and/or educated individuals are more likely to intermarry, thus potentially skewing the children’s perception of the reality faced by the two ethnic groups, these personal experiences cannot be used as concrete evidence that ethnic tensions are lessening. However, the subconscious need for individuals of dual ethnicity to counter stereotypes, while it does highlight an internalization of them, is also a necessary step to their erosion. So too is the fact that most of those surveyed initially refuse to “choose a side”, only to later admit that they identify as “more of” one ethnicity or the other in order to fit into the dominant social framework focused on categorization<sup>145</sup>. The erasing of such deeply entrenched divisions does not happen overnight. Just as the ethnicities are slowly beginning to mix, so too will the perceptions of them. The children of mixed unions are still the products of their greater society, who do still rely on the Mizrahi-Ashkenazi binary, and in order to fit into this social structure, they must have a means of translating their individual identities into a language those around them can understand, even if that translation is indirect. Constantly put in defense of their identity, this ever-growing segment of the population, while sometimes having to resort to inaccurate language, is creating a new word in the language that is Israeli culture. Just like the evolution of language, it will take some time before such a term becomes official, entered into the dictionary of culture. In the time being, some people may not understand its definition,

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<sup>143</sup> *Id.* at 13. I take issue with Sagiv and Yair’s description of their respondents as third generation, seeing as they are the children of one Ashkenazi parent and one Mizrahi parent. In my belief, this would either make them first generation from the point of view of ethnic mixing or second generation in terms of removal from binary ethnic identity.

<sup>144</sup> Talia Sagiv, *On the Faultline: Israelis of Mixed Ethnicity*, 36 JOURNAL OF ISRAELI HISTORY 249 (2017). at 254 – 259.

<sup>145</sup> *Id.* at 259.

and even more may not be able to use it naturally in conversation, but over time, the meaning will become more widely understood.

#### ***D. New Intermarriage: The Threat of Further Redefinition***

With all the controversy surrounding intra-Jewish marriage, the concept of a Jew marrying a non-Jew, though widely practiced in some diasporic communities, remains even more socially unacceptable as well as legally inaccessible within the Israeli context. Out of all couples in Israel, only 5.2% were comprised of individuals from different religious backgrounds<sup>146</sup>. This is a relatively large figure given my emphasis on the taboo nature surrounding mixed relationships because, of this percentage, the vast majority (84.4%) of interfaith couples (or 4.67% of total couples) were between a Jew and an “other”, the latter category being primarily comprised on non-affiliated ethnic Jews who simply not qualify as Jewish under *halacha*. Due to the fact that they are considered Jewish at least by the civil organs of the state, it is likely that toleration of someone fully recognized as Jewish marrying someone of non-affiliated status is higher than if that same Jew were to marry someone from a different recognized religious category. The statistics reflect further movement down the social hierarchy, with Jewish-Christian relationships accounting for 10.8% of mixed relationships (0.6% of total couples), and Jewish-Muslim marriages for 1% of interfaith marriages and (0.05% of all marriages in Israel)<sup>147</sup>.

The intention behind the state’s deference to the religious authorities on certain elements of personal status law is evident by the challenges faced by those in Jewish-Arab—be they Muslim or Christian—relationships. Throughout this case study, I have referred to a perceived demographic threat. In a classic chicken-versus-egg scenario, nationalism/ethnic/religious attachment begets endogamy, or vice versa. Either way, there is a commitment to ensuring that the national/ethnic/religious identity is, first, propagated at all, and second, propagated as purely as possible. Consider this logic within the context

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<sup>146</sup> DellaPergola, *supra* note 79, at 154.

<sup>147</sup> Figures are either directly from or calculated from data in *Id.* at 154, 156, Table 3.

of a people who view their history as one of being targeted, one forced into diaspora, for this is at least how it is conveyed to children of Ashkenazi families. Further contextualize a subgroup of this population as having been raised in a country constantly in conflict, a country who was only granted recognition three years after a third of their total ethnic—not just national—brethren were slaughtered. It's not only nationalism, but nationalism compounded by fear. This is the fear that dominates our collective, and, unfortunately, it is the same fear that wins elections and allows policies that contribute to social stratification.

Though often portraying themselves as the hegemon of Jewish authority, over half of the global Jewish population live outside of Israel, primarily in the United States, which by some estimates, is home to even more Jews than Israel<sup>148</sup>. Considering in terms of percentage of the population, however, Jews remain a very small minority everywhere outside of Israel, intermarriage amongst diasporic populations is high, standing at 52% in the US<sup>149</sup>. This phenomenon has been viewed by many as a “racial suicide<sup>150</sup>”, one that the Israeli state has made it their mission to prevent. Rates of intermarriage in Israel akin to those of the United States would be devastating to the state as an entity, for how could they claim to be the home of an ethnic population when the eventual majority of those within the state would not belong fully to said ethnic group? Despite belonging to the country's current majority, interfaith marriage, particularly with Arabs, is thus seen as “assimilation” in the sense that a high frequency of the practice would cause Jews as an ethnoreligion have their collective identity overrun. Arabs were thus othered, demonized, and largely shut out from Jewish society due to the sheer demographics of Palestine, as they were the only other ethnic group in the country whose numbers were large enough to pose a threat.

Sagiv and Yair's channels for unification of Mizrahi and Ashkenazi Jews can be used as a tool of analysis for ways in which the state has also furthered divisions between Jews and Arabs as an integral part of the new pan-Jewish identity:

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<sup>148</sup> Pew Research Center's Religion & Public Life Project. 2012. *Jews*. [online] Available at: <<https://www.pewforum.org/2012/12/18/global-religious-landscape-jew/>> [Accessed 15 July 2020].

<sup>149</sup> Saxe, *supra* note 122, at 152.

<sup>150</sup> Elise Burton, *An Assimilating Majority?: Israeli Marriage Law and Identity in the Jewish State*, 8 JOURNAL OF JEWISH IDENTITIES 73 (2015). at 74.

*Education* – Whereas the socioeconomic inequality may create a segregation between Ashkenazi and Mizrachi students in the public educational system, this is an effect of social inequality rather than a means of its propagation. Currently, Jewish and Arab schoolchildren are enrolled in entirely different schools, with Arab students being all but nonexistent in Jewish schools<sup>151</sup>. As Arab schools are disproportionately underfunded, inequality perpetuates itself in two different ways: through a lack of educational resources which beget a lack of employment and political power, as well as through the chronic “othering” that results when children are not exposed to individuals from other social groups. Prejudices are easy to pass through the generations when they are not countered in the younger generation’s formative years. Separation becomes the foundation upon which the youth build their standards of normalcy when it comes to social interaction, an engrained status quo that is hard to challenge because it is not seen as something that must be challenged at all.

To be specific, only primary and secondary education is segregated in Israel. Universities see students from both ethnic and all religious groups, a trend that has opponents of intermarriage worried. With more Arabs, particularly more Arab women, attending higher education, the level of interaction between Jews and Arabs in Israeli society is increasing<sup>152</sup>. This new exposure to the other, which had previously been so intentionally limited, leaves more chances for interfaith coupling.

*Military Service* – Israeli Jews typically complete their mandatory military service immediately after high school. Due to the segregation of the ethnicities in the public educational system, as well as the fact that Jews and Arabs almost always live in different areas<sup>153</sup>, it is only during their time in the IDF that many young Jews are exposed to Arabs for the first time, usually on opposite sides of the conflict. This context does not necessarily inspire trust. While Arabs can serve in the military, conscription is not required for Israeli Arabs as it is for Israeli Jews. The reasoning for this seemingly explains itself given the very nature of the conflict. Arab citizens belong to the same ethnonational group as the state’s single greatest security threat, so it would be a conflict of interest, and quite possibly, a detriment to the state, to require their service. It is because of this rationale that the usage of mandatory military conscription in the establishment of a pan-Jewish

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<sup>151</sup> Ayman K. Agbaria, *The “Right” Education in Israel: Segregation, Religious Ethnonationalism, and Depoliticized Professionalism*, 59 CRITICAL STUDIES IN EDUCATION 18 (2018). at 22 – 23.

<sup>152</sup> *Id.* at 222.

<sup>153</sup> Yohai Hakak, *Battling Against Interfaith Relations in Israel: Religion, Therapy, and Social Services*, 42 JOURNAL OF MARITAL AND FAMILY THERAPY 45 (2015). at 46.

identity is so profound. In using the politics of exclusion, the state was able to capitalize on one of the few areas where it was inherently in the interest of national security to create a division between the Arabs and the “Arab Jews”, not so favorable nomenclature used to reference those with roots in the Arab/Islamic World. This division, quickly cemented into normalcy, provided the foundation for integrating the Mizrachim into “proper” Jewish culture.

*Intermarriage* – See this entire paper.

These divides result from a desperation of Jewish leadership to maintain majority status within the country, as they directly impact the degree of contact Jews and non-Jews have with one another, thus greatly decreasing the likelihood of relationship formation. With the mass immigration of non-affiliated individuals came a large segment of the population not considered to be Jewish, thus decreasing the percentage of “true Jews” within the country. Both this problem and the lingering issue of Arab population growth were solved by a greater emphasis on insularity.

For mixed couples who manage to overcome or simply negotiate the social divides presented, there are legal parameters in place as well that cement their relationships as inferior, given the fact that “the Supreme Court has refused to acknowledge the existence of common law marriage in the case of an interfaith couple<sup>154</sup>”. If the couple is comprised of a Muslim man and a Jewish or Christian woman, they can be married under Islamic Law. Though technically a legal option, this arrangement confuses the state. Morel Malka from the infamous case study, despite having had converted to Islam, was still routinely identified as Jewish due to her ethnic heritage and the religion in which she was raised, creating a dichotomy in which “her future children would be regarded as Jewish according to halakha but treated as Muslims by the Israeli state....[condemning] her ‘Jewish’ children to a less privileged life within Israeli society<sup>155</sup>”. As is further supported by the case of the non-affiliated, in the divvying up of authority to various religious jurisdictions, individuals must be categorized according to clear-cut definitions, thus excluding anyone who fails to meet all the prescribed criteria. While “think of the children” is a frequent cry made by

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<sup>154</sup> Triger, *supra* note 78, at 9.

<sup>155</sup> Burton, *supra* note 150, at 84.

opponents of interfaith marriage, it is precisely these opponents, not the children's parents, who condemn the products of mixed relationships to a legal gray area. Malka's depiction as Jewish in spite of her conversion to another religion is not entirely false either, given that Jews really do not have the option to not be Jewish, even if they do not practice Judaism as a religion. Even those who convert to other faiths are thought to remain as part of the Jewish collective. Under *halacha*, in which everyone with a Jewish mother is recognized as Jewish, Malka's children with her Muslim husband could still be classified according to the ethnoreligious identity of their maternal grandparents. In theory, children resulting from marriages similar to Malka's fall under the jurisdiction of both the Rabbinate and the Shari'a Courts, with no concrete answer regarding the degree of choice the children would have as to which law they are subjected. This need to belong to one group or the other also extends beyond matters of personal status law and social perception, encompassing questions such as which educational system the children will be enrolled in and whether they are considered "Arab enough" to be exempt from mandatory military conscription.

The breakdown of interfaith marriage in Israel is highly gendered as well. Women from higher on the social hierarchy are more likely to marry men from lower levels than men are to "marry down"<sup>156</sup>. This could be the result of two social factors. While the status of the nonaffiliated proves that there is a differentiation between Jewish as an ethnicity and Judaism as a religion, the vast majority of Jews in Israel are both. According to *halacha*, Judaism passes along the maternal line. Perhaps because women are seen as the ones responsible for identity propagation, it would likely be more acceptable for many families to have their Jewish daughters marry outside the ethnoreligious group than their Jewish sons, as the former would still produce more Jews while the latter would produce more non-Jews. Secondly, the religious legal channels in Israel are more suited for Jewish women to intermarry. The Rabbinate does not approve marriage of a Jew and non-Jew regardless of the gender/religious composition of the couple. Though exact rules on the matter vary between denomination, Christian churches

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<sup>156</sup> DellaPergola, *supra* note 79, at 154 – 155.

in Israel also largely refuse to legitimize interfaith unions<sup>157</sup>. While it is forbidden under Islamic Law for a Muslim woman to marry a non-Muslim man, Muslim men have more freedom as the religion is seen to pass through the paternal line. Islamic Shari'a thus recognizes marriages between Muslim men and women from faiths given a special status in Islam, including Christianity and Judaism, which in this case are the other primary religious groups. This caveat makes the marriage legally binding, at least under one religious jurisdiction, giving Jewish women, but not Jewish men, the legal option to “marry down”.

The gendered dimensions of intermarriage in Israel are even more complicated when analyzing the reception of such unions amongst the public. Though Jewish women are more likely to marry someone of a lower ethnoreligious social status, amongst both Jews and Muslims, it is more common for men to marry someone outside of their religious background<sup>158</sup>. As a non-affiliated individual is likely Jewish by ethnicity but not by religious status, they encompass a grey area in Israel's social hierarchy, meaning that a man recognized as Jewish by the Rabbinate may not be considered as “marrying down” if he weds a non-affiliated woman of Jewish ethnic origin. To reiterate, the vast majority of interfaith marriages (84.4%) in Israel are between a Jew and a non-affiliated individual, which would explain the discrepancy in the data. Just as there are factors that would make it more acceptable for a woman to intermarry, there are factors that would make it more acceptable for men, seeing as acceptability is often determined by very specific individual contexts. Perhaps not surprisingly, as a result of this gendered distribution of power, the responsibility of continuation of an identity has largely fallen upon women. In *Bearers of the Collective*, Yuval-Davis illustrates the ways in societies have placed the burden of continuation of the identity on women. Especially within contexts in which there is substantial sectarian division, women are transformed simply from women into “our women” and “their women”, commodification necessary to ensure future demographics. Writing specifically on her country of origin, “controlling women

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<sup>157</sup> The Law Library of Congress, PROHIBITION OF INTERFAITH MARRIAGE, (2015), <https://www.loc.gov/law/help/marriage/prohibition-of-interfaith-marriage.pdf> (last visited Jan 7, 2020). at 10.

<sup>158</sup> DellaPergola, *supra* note 79, at 156.

and their familial status [is] of crucial importance to the Zionist movement which gives the utmost importance to reproducing the national boundaries of the Jewish people, in and outside Israel<sup>159</sup>”. Seeing as women are generally considered the ones responsible for the reproduction of identity rather than just the reproduction of the species, frequent rhetoric used to discourage and/or condemn Jewish-Arab relations involves phrases constructed around the possession of the collectives’ females.

Such a gendered disapproval, including the frequently invoked honor narrative, is seen by the most vocal opponents to mixed marriage, notably the organizations of Lehava and Yad L’Achim. Both are comprised of mainly Orthodox or ultra-Orthodox, male, Mizrahi youth dedicated to preventing interfaith unions<sup>160</sup>. Lehava, whose name is literally the acronym for “for the prevention of intermarriage in the Holy Land” in Hebrew<sup>161</sup>, focuses primarily on preventing these relationships before they can begin by launching a variety of campaigns to prevent what they see as the “assimilation” of the Jewish people. Writing on Lehava specifically, though the organization’s stance is shared by Yad L’Achim, Engelberg summarizes its logic as such:

Honor seems to be involved in Lehava’s objection to Arab men courting Jewish women....in patriarchal nationalist thinking, when men of “the enemy” have sex with “our daughters,” it is considered to be a terrible offense against the nation, leading to reprimand and punishment. When Arab men date Jewish women, they are seen by extreme right-wing Israelis as committing an act of hostility....[sic new paragraph] when Arab men from Eastern Jerusalem go out to the Western parts of the city seeking [Jewish] women who are not limited by the conservative sexual standards enforced upon Arab women in East Jerusalem....They do not bring their sisters with them to meet Jewish boys.<sup>162</sup>

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<sup>159</sup> Nira Yuval-Davis, *The Bearers of the Collective: Women and Religious Legislation in Israel*, 4 FEMINIST REVIEW 15 (1980). at 21.

<sup>160</sup> Ayelett Shani, ‘They’re Not Like neo-Nazis’: Inside the Israeli Movement Fighting Jewish-Arab Intermarriage, Haaretz, Dec 15, 2018, at 1, <https://www.haaretz.com/israel-news/.premium.MAGAZINE-inside-israeli-movement-fighting-jewish-arab-intermarriage-1.6744186> (last visited Jan 7, 2020).

<sup>161</sup> Ari Engelberg, *Fighting Intermarriage in the Holy Land: Lehava and Israeli Ethnonationalism*, 36 JOURNAL OF ISRAELI HISTORY 229 (2017). at 229.

<sup>162</sup> *Id.* at 240.



The same group responsible for the protest of the Malka-Mansour wedding mentioned in the introduction, Lehava is also famous for plastering signs warning Arab men “don’t [even] think of touching a Jewish girl” written in both Hebrew and Arabic<sup>163</sup>—for which the Arabic translation is incorrectly conjugated. They are also infamous for frequently patrolling the streets to disrupt what they consider to be predatory interactions<sup>164</sup>. But public awareness is not the only arena in which they’re active. At the legal level, Lehava was also successful in petitioning the Israeli National Service to prevent Jewish women from working the night shifts at hospitals in order to keep them from coming into contact with Arab men<sup>165</sup>. Yad L’Achim is less focused on awareness campaigns and more on “rescuing” Jewish women they perceive as victims of their Arab partner’s abuse. While both Lehava and Yad L’Achim offer help lines for the “victims” of these relationships, the latter takes it a step further. At the woman’s request, the Yad L’Achim launches armed rescue missions to extract the wife and any children she may have from her Arab husband’s home<sup>166</sup>. At the time of this writing, they claim to have “saved” 751 individuals<sup>167</sup>. While it is doubtful such breaking, entering, trespassing, and possible kidnapping are completely legal, “investigations have revealed that [both organizations] have received various forms of assistance from the Israeli government...including funding, classified information, and a convenient blind eye to some legal transgressions<sup>168</sup>”.

The rhetoric employed by right-wing organizations is one thing, but whether the general public believes this sexual panic narrative<sup>169</sup> is another entirely. Regarding the perception of interfaith marriages by the general population, as of 2009, 63% of Jewish Israelis believed that the state should implement a system of civil marriage. While that

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<sup>163</sup> Shani, *supra* note 160. The Arabic present in Lehava’s sign says “لا نفكر لمس فتاة يهودية” which translates to “we don’t think of touching a Jewish girl” instead of the intended command tense. Personally, I find this error hilarious and very telling of the composition of this organization.

<sup>164</sup> Hakak, *Battling Against*, *supra* note 153. at 45.

<sup>165</sup> Hakak, “*Undesirable Relationships*”, *supra* note 77, at 977.

<sup>166</sup> *Id.* at 976 – 977.

<sup>167</sup> Figures are proudly displayed on the homepage of their English website: <https://yadlachim.org/>. Lehava also has an English website, that though not very informative, can be found here: <https://www.lehava-us.com/>.

<sup>168</sup> Burton, *supra* note 150, at 87.

<sup>169</sup> For further analysis based upon this theory, see Hakak, *Battling Against*, *supra* note 153.; and Hakak, “*Undesirable Relationships*”, *supra* note 77.

figure has declined slightly 1999, in which agreement stood at 65%, the overall trend since first survey in 1969 is one of increasing support<sup>170</sup>. This is not directly correlated to support of intermarriage, though such a policy would provide a much easier process for interfaith couples is a widely known fact. When talking specifically about interfaith unions, however, the majority of Israeli society appears to be quite insular. Even removing “the enemy” from the equation, “about two-thirds of Israeli Jews would not support a member of their family marrying a non-Jewish American citizen of a non-Jewish immigrant from the FSU [former Soviet Union]<sup>171</sup>”. When discussing intermarriage with local populations, 97% of Jews would either be “not to” or “not at all” comfortable with their child marrying a Muslim, with 89% expressing the same level of discomfort with the idea of their child choosing Christian partner<sup>172</sup>. It should be noted, however, that these figures are based upon hypothetical prospects. In all fairness to those surveyed, it cannot be determined whether they would actually feel this way if put in such a situation. People who have never had their beliefs challenged are unlikely to question them on their own. If given the choice between no longer having a relationship with their own child and abandoning someone else’s construction of ethnoreligious-nationalism, a great deal of that 97% and 89% may choose the latter.

At the political level, debates over the establishment of a system of civil marriage accessible to all citizens have been waging for decades, with the second and third most popular political parties in the 2019-2020 Knesset elections both having promised to implement civil marriage for all should they be successful in ousting Netanyahu’s conservative Likud Party from power<sup>173</sup>. Israeli media is also divided, yet the spectrum of stances suggests that there is a sizeable portion of the population who are not completely

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<sup>170</sup> Bystrov, *supra* note 70, at 757, Table 1.

<sup>171</sup> *Id.* at 763.

<sup>172</sup> Pew, “Israel’s Religiously”, *supra* note 76.

<sup>173</sup> Election results can be found *Here: Final Results: Israel Election 2019*, Haaretz, Sep 13, 2019, at 1, <https://www.haaretz.com/israel-news/elections/EXT-INTERACTIVE-election-results-israel-2019-polls-netanyahu-gantz-1.7695785> (last visited Jan 9, 2020). For Kahol Lavan’s campaign promise, *see; Who Is Benny Gantz, the Former General Tasked With Forming Israel's Next Government*, Haaretz, Oct 24, 2019, <https://www.haaretz.com/israel-news/benny-gantz-government-netanyahu-israel-pm-1.7087481> (last visited Jan 8, 2020). For Yisrael Beiteinu’s, *see: Toi Staff, Gantz and Liberman Said to Agree on Civil Marriage, Other Religion Reforms*, Nov 18, 2019, <https://www.timesofisrael.com/gantz-and-liberman-said-to-agree-on-civil-marriage-other-religion-reforms/> (last visited Jan 9, 2020).

opposed to the notion of interfaith unions. Fogiel-Bijaoui categorizes media response to the Malka-Mansour marriage into three categories: a human rights/individual freedom discourse, a Romeo and Juliet story, and an assimilation narrative<sup>174</sup>. These categories roughly correspond to where sources fall on the political spectrum: left-wing, central, and right-wing. The former two appear fairly positive, however, it must be noted that the categories were not evenly divided, so the two-versus-one majority does not necessarily apply in this case. Hostilities towards the concept may be lessening amongst the general Israeli population, but there is quite a big difference between not necessarily opposing something and supporting it. Furthermore, whereas the media outlets who portrayed the marriage in a negative light took an active role in the discouragement of such unions, those who viewed the marriage favorably did not encourage others to enter into mixed relationships. Given the ever-increasing ultra-Orthodox population, whether there will be more acceptance, more contempt for, or an overall plateau in social perception of the matter going forward is currently anyone's guess.

#### **IV. Conclusion**

The use of marriage as a means of regulating future demographics is neither new nor unique to countries in which remnants of the millet system are still seen. The regulation of the family, of coupling, of acceptable household structure, was and continues to be a means of crafting the ideal future population. Systems that still delegate authority over these questions to the religious leadership do so only because the rules prescribed by religious doctrine(s) support the policy the state otherwise would have chosen to implement anyway. Only, by contracting away power in such a manner, the state also contracts away accountability as clerics do not have to worry about reelection. Especially in the case of Israel, in which legitimacy is derived from ethnonational principles and superiority, the corresponding religion and the codification of its tenants are more tolerated than if the three cleavages—ethnicity, nationality, and religion—were

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<sup>174</sup> Fogiel-Bijaoui, *supra* note 1.

not so tightly interwoven. If Jews want Israel to remain Jewish, they will tolerate the Rabbinat's stronghold over these select matters of personal status regardless of individual religious belief, as fracturing the Orthodox hegemony could fragment the Jewish population much like the Arab population has been. Through the politics of difference, through the basing of politics on difference, segregation is the result of endogamy and endogamy the result of segregation.